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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 855

COMMONWEALTH EX. REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin
County Prison, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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TABLE OF CONTENTS

	PAGE
Opinions of the Court Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting Writ	8

APPENDIX

Appendix A—Judgment Below	1a
Appendix B—Portions of Record Showing That Federal Questions Were Timely and Properly Raised	2a

TABLE OF CITATIONS

CASES

Daugharty v. Gladden, (9th Cir. 1958) 257 F. 2d 750, 758	6
Garner v. Louisiana, 368 U.S. 157, 82 S. Ct. 248; 7 L.Ed. 2d 207 (1961)	8, 9
Konigsberg v. State Bar of California, 353 U.S. 252, 77 S. Ct. 722; 1 L.Ed. 2d 810 (1957)	10
Raley v. Ohio, 360 U.S. 423, 437; 79 S. Ct. 1257; 3 L.Ed. 2d 1344 (1959)	6
Schware v. Board of Examiners, 353 U.S. 232, 77 S. Ct. 752; 1 L.Ed. 2d 796 (1957)	10
Thompson v. Louisville, 362 U.S. 199; 80 S. Ct. 624; 4 L.Ed. 2d 654 (1957)	8, 9

ANNOTATIONS

Conviction of Criminal Offense Without Evidence as Denial of Due Process of Law, 80 ALR 2d. 1362	9

AUTHORITIES

Comment, 74 Harvard Law Review, 108	8
Comment, 59 Michigan Law Review, 306, 309	8

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NO. .....

COMMONWEALTH EX REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on January 30, 1962.

OPINIONS OF THE COURT BELOW

The opinion of the Pennsylvania Supreme Court, on original proceeding for Writ of Habeas Corpus, is reported at 406 Pa. 268, 177 At.2d 619.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 30, 1962 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does not the Fourteenth Amendment interdict a State's conviction and imprisonment of a criminal defendant where at his trial there was introduced only scanty evidence, arguably adverse to the defendant, which does not in reason support the jury's finding of his guilt?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Certiorari is sought in this case to review the refusal of the Pennsylvania Supreme Court to issue a writ of habeas corpus, releasing petitioner from confinement under a state conviction and sentence.[1]

In January 1957, petitioner and eight other persons were indicted on charges of having conspired to cheat and defraud the Pennsylvania Turnpike Commission of vast sums of money in connection with the construction of an extension to the Pennsylvania Turnpike. Petitioner was also charged in a separate indictment with three counts of misbehavior in office, based upon the same charges. (Opinions below p. 53a)

In July 1957, petitioner was convicted on both indictments after a trial which lasted more than seven weeks, and in which all of the charges against the various defendants were consolidated (9 defendants, 4 indictments containing a total of 27 counts) over petitioner's objections. (Opinions below p. 86a).

The theory of the Commonwealth's case was that, as a result of low construction bids received in connection with a proposed extension of the Pennsylvania Turnpike, the Commission acquired a fund from the sale of bonds which was approximately $20,000,000 in excess of the cost of the work. The indictments charge

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1. This petition is companion to a petition filed at the same time for a writ of certiorari to the Court of Appeals for the Third Circuit. The issue presented here was tendered to the Court of Appeals for the Third Circuit, but not decided because of that Court's conclusion that petitioner had failed to exhaust his state remedies as to the issue.

that the defendants conspired among themselves to drain this fund from the Turnpike treasury and into the hands of the officers and stockholders of a company known as the Manu-Mine Research and Development Corporation, by entering into a contract for unnecessary work, for which Manu-Mine was to be paid at an unconscionably high rate. (Opinions below pp. 45a-49a)

The challenged contract was approved unanimously by all of the members of the Pennsylvania Turnpike Commission and was approved as to form, by its general counsel. Except for petitioner and the Commission Chairman (whose relatives owned a substantial interest in the Manu-Mine Research and Development Corporation), none of the Commissioners who approved the contract and the payments made thereunder were indicted in connection with the scandal. (Opinions below —pp. 129a-131a)

The charges against petitioner came at the twilight of a long life of dedicated public service. (Trial record 5105r-5108r) It has been, and is, his contention that there is no evidence, which in reason supports the finding of the jury that he was a participant in the conspiracy. There was no direct evidence that petitioner had participated in the conspiracy. As to this, the Commonwealth's case rests, admittedly, on circumstantial evidence entirely. (Opinions Below—74a-76a; 129a-139a)

The principal thrust of the Commonwealth's case was that the contract with Manu-Mine was let without competitive bidding and lacked certain customary provisions, relating to performance bonds and other security devices; that the work performed was almost entirely unnecessary and was paid for at a rate which was

three to four times its reasonable cost. (Opinions below, pp. 54a-71a) The testimony showed that Manu-Mine reaped profits far in excess of those which it had represented it could expect to receive. However, the contract in and of itself did not authorize the performance of any work at all by Manu-Mine. It provided merely for the rate of payment. All of the work actually done under the contract was required to be separately approved in writing, in advance by the engineers of the Turnpike Commission. (Trial record, 2541r-2543r) All of the payments made for the work were likewise first approved by the engineers and auditors of the Turnpike Commission. (Trial record, 1245r-1249r) The contract itself was approved by all the members of the Commission, as were all payments made thereunder, until the work under the contract was suspended in February of 1956. Moreover, the form of the contract was approved by the General Counsel of the Turnpike Commission and by the Commission's Engineering department. (Trial record 555r, 820r)

About the only circumstance in the entire case which may be said to cast suspicion upon petitioner, is the fact that in December 1954, a few weeks before the contract was approved, petitioner was given a $200.00 gift certificate by one of the officers of the Manu-Mine Company and several months later he used the certificate. However, there was an innocent explanation for this gift. The undisputed evidence is that several months before the bond fund came into existence, petitioner had permitted Manu-Mine to install an experimental gunnite surface on a trench silo on his farm in Westmoreland County and to publicize the installation in farm journals. The gift certificate was given as a

routine business courtesy in appreciation of Mr. Torrance's permitting this to be done. (Opinions below—136a-137a; 181a-183a) It is petitioner's position that the record is devoid of evidence of sufficient probative force to sustain his conviction and that his imprisonment is, for this reason alone, a deprivation of liberty without due process of law.

How The Federal Question Was Raised and Passed Upon

At the conclusion of the Commonwealth's case, petitioner challenged the sufficiency of the evidence by filing a demurrer to the evidence which was overruled. (Appendix B) After his conviction, petitioner challenged the sufficiency of the evidence by motion for arrest of judgment. (Appendix B) Petitioner appealed to the Pennsylvania Superior Court from the denial of this motion. The Superior Court affirmed by a vote of 4-3. The Pennsylvania Supreme Court granted petitioner his application for review on allocatur, but affirmed petitioner's conviction, per curiam, upon the opinion of the Superior Court, by a vote of 4-2. This Court refused to grant certiorari. (364 U.S. 899)

While the sufficiency of the evidence was thus clearly raised at every opportunity provided for by Pennsylvania procedure, petitioner had not specifically invoked the Federal Constitution with reference to that issue.[2] In his application to this Court for certiorari to the Pennsylvania Supreme Court at No. 418 October

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2. (See *Daugharty v. Gladden*, (9th Cir. 1958) 257 F.2d 750, 758; *Raley v. Ohio*, 360 U.S. 423, 437; 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).)

Term 1960, the question of the absence of evidence to support petitioner's conviction was not tendered to this court.

After this Court refused certiorari, petitioner began service of the sentences which had been imposed. He then filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania and when that Court refused the writ, he appealed to the Court of Appeals for the Third Circuit. In the federal habeas corpus proceedings, petitioner contended, inter alia, that the record at the state trial was so devoid of evidence pointing to his guilt that his conviction was contrary to due process. The Court of Appeals refused to pass upon this question, holding that petitioner's failure to tender it to this Court in his earlier Petition for certiorari to the Pennsylvania Supreme Court at No. 418 October Term 1960, resulted in a failure to exhaust petitioner's state remedies.

After the decision of the Court of Appeals, petitioner filed an application to the Pennsylvania Supreme Court for the issuance of a writ of certiorari on original jurisdiction. The Court accepted original jurisdiction, but refused to issue the writ, holding that there was not such a total lack of evidence in support of a finding of petitioner's guilt as to raise a federal constitutional question. Review of this judgment is the objective of this petition.

REASONS FOR GRANTING WRIT

This case presents an opportunity to this Court to make clear for the guidance of lower courts, both state and federal, the extent to which the sufficiency of the evidence to support a conviction in a state criminal case must be viewed from the perspective of a federal constitutional problem, in the light of the decisions of this Court in *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624; 4 L.Ed. 2d 654 (1957) and *Garner v. Louisville,* 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961). This Court's decision in *Thompson v. Louisville* prompted some authorities to observe that the court had added "a new dimension" to the concept of due process of law. See Comment, 74 *Harvard Law Review* 108. Others have openly doubted that this Court seriously meant to assert that the entry of a judgment of conviction, upon a record which contained insufficient evidence to support a rational finding of guilt, should be considered a violation of the Fourteenth Amendment. See Comment, 59 *Michigan Law Review,* 306, 309. Indeed, some of the members of this Court have expressed misgivings concerning the sweep of that decision. See the Opinion of Mr. Justice Harlan, *Garner v. Louisville,* 368 U.S. 185 at 190.

The language in the majority opinions in both *Thompson* and *Garner* justified these caveats. In *Thompson,* the Court said, at page 199:

> "The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the due process clause of the Fourteenth Amendment. Decision

of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.

In *Garner*, this Court said, at page 163:

> "As in *Thompson v. City of Louisville*, 362 U.S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction but on whether these convictions rest upon any evidence which support a finding that the petitioners' acts caused a disturbance of the peace."

With such a gloss, these cases do not in fact add a new dimension to the concept of due process of law, but on the contrary they narrow and restrict it. It is therefore important that the matter be reexamined and clarified. This case presents an appropriate opportunity to do so and at the same time to redress a miscarriage of justice of gravity and magnitude.

The holdings in *Thompson* and in *Garner*, it is submitted, were not startling innovations in the field of federal constitutional law, but rather the natural and logical application, in the field of criminal convictions, of well recognized traditional constitutional principles which compel the conclusion that it is a violation of due process for a state to uphold a conviction entered upon a record so devoid of evidentiary support that a jury could not, in reason, have entertained the belief that the defendant was guilty of the crime charged. See Annotation: *Conviction of Criminal Offense Without Evidence as Denial of Due Process of Law*, 80 ALR 2d 1362.

Reasons for Granting Writ.

In *Konigsberg v. State Bar of California*, 353 U.S. 252, 77 S. Ct. 722, 1 L.Ed. 2d 810 (1957), this Court examined the record of the proceedings in a state tribunal and held at page 733:

> "In this case we are compelled to conclude that there is no evidence in the record which rationally justifies a finding that Konigsberg failed to establish his good moral character or failed to show that he did not advocate forceful overthrow of the Government. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, it is difficult to comprehend why the State Bar Committee rejected a man of Konigsberg's background and character as morally unfit to practice law. As we said before, the mere fact of Konigsberg's past membership in the Communist Party, if true, without anything more, is not an adequate basis for concluding that he is disloyal or a person of bad character. *A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the Committee's action.*" (emphasis added)

In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752; 1 L.Ed. 2d 796 (1957), this Court held that Schware had been deprived of due process in being denied the right to practice law in New Mexico because the record there contained no evidence which "rationally justified" a finding that he was morally unfit to practice law. This Court reached this conclusion notwithstanding there was evidence in the record that he had been arrested, had used aliases, and had been a member of the Communist Party.

The record in these cases contained as much evidence which reflected upon Konigsberg's or Schware's fitness to practice law, as did the record in petitioner's criminal trial to support a find of his guilt. It is submitted that the requirement of "no evidence" laid down in *Thompson* and *Garner* should be broadened to suit the more accurate formulations suggested in *Konigsberg* and *Schware*—i.e. "no evidence *which rationally supports the finding.*"

It is certainly a more serious deprivation of due process to be deprived of one's liberty, than to be denied the opportunity to practice a profession. A lifetime of good citizenship, *a fortiori*, ought to protect one from conviction and imprisonment on evidence of so little probative value.

It may be possible, in some jurisdictions, to draw a distinction between evidence sufficient to support a "rational finding" and evidence sufficient to justify submission of a case to a jury. Such a distinction becomes metaphysical; however, in those jurisdictions where the standard which determines whether a case must be submitted to the jury is the existence of evidence which would in reason support the findings necessary to their decision. This is the standard which determines the submissibility of a case in Pennsylvania and was the very standard applied by its courts in determining the sufficiency of the evidence to support the jury's findings of petitioner's guilt. (Opinions below, p. 55a)

The salutary constitutional principles reflected by the decisions in *Thompson* and *Garner* are denigrated by the "no evidence" language of these decisions. State courts and lower federal courts, because of the language

of *Thompson* and *Garner*, may conclude that a trial record containing insufficient evidence in reason to support a guilty verdict may still contain "some evidence" and therefore that no federal right of the defendant's is affected by his conviction. It seems almost certain that this was done by the court below, with the result that petitioner did not get that Court's close and serious consideration of the merits of his position. Petitioner's case presents an opportunity for this Court to provide the guidance and clarification which the state courts and lower federal courts require in this important developing field of constitutional law. For these reasons it is repectfully requested that a Writ of Certiorari be issued.

ELDER W. MARSHALL
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Attorneys for petitioner

APPENDIX A

Judgment Below

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
EX REL. JAMES F. TORRANCE
v.
JOSEPH SALZINGER, Warden of the
Dauphin County Prison

Miscellaneous
Docket No. 12
No. 278

ORDER

AND NOW January 15, 1962 a rule to show cause why the prayer of the within petition should not be allowed is granted; returnable on January 16, 1962 at 10:00 A.M., at Philadelphia; and it is directed that the Prothonotary of this Court advise Huette F. Dowling, Esquire, Special Deputy Attorney General of the return date of this rule.

BY THE COURT
JOHN C. BELL, JR.
Chief Justice

January 30, 1962 Rule discharged and Petition dismissed.

BELL, C.J.

APPENDIX B

Portions of the Record Showing That the Federal Questions Was Timely and Properly Raised

Excerpts from Record at Criminal Proceedings

pp. 3110r-3111r:

Mr. Burch: If the Court please, I present a demurrer on behalf of James F. Torrance in No. 216 January Sessions, 1957, which is the conspiracy charge, and I also present a demurrer to No. 220 January Sessions, 1957, which is the misbehavior in office charge and that demurrer demurrs to each of the three counts individually.

* * * * * * *

Page 3115r:

The Court: The demurrer of James F. Torrance is overruled.

Mr. Stewart: Exception, Your Honor.

The Court: Exception.

* * * * * * *

Page 67a

Motion in Arrest of Judgment
216 January Session 1957

To the Honorable the Judges of the Court of Quarter Sessions of Dauphin County, Pennsylvania:

And Now, August 1, 1957 comes the defendant, James F. Torrance, by his attorneys Nauman, Smith, Shissler & Hall, and respectfully moves your Honorable Court to arrest the judgment against him for the following reasons:

* * * * * * *

Appendix B.

3. The evidence is insufficient to sustain a verdict of guilty.

4. The evidence fails to sustain the charge for which the defendant was indicted.

* * * * * * *

431a

Motion and Arrest of Judgment On Behalf of James F. Torrance, 220 January Sessions 1957

To the Honorable, the Judges of the Court of Quarter Sessions of Dauphin County, Pennsylvania:

And now, August 1, 1957, comes the defendant, James F. Torrance, by his attorneys Nauman, Smith, Shissler & Hall, and respectfully moves your Honorable Court to arrest the judgment against him for the following reasons:

* * * * * * *

3. The evidence is insufficient to sustain a verdict of guilty.

4. The evidence fails to sustain the charge for which the defendant was indicted.

* * * * * * *

310a

And now, May 26, 1958, each of the motions in arrest of judgment and for a new trial in Nos. 216, 218, 220 and 221 January Sessions 1957 is hereby overruled and the District Attorney of Dauphin County is directed to call the defendants for sentence on Thursday, June 5, 1958 at 9:30 o'clock A.M. (EDST).

S. Homer L. Kreider
Judge

Petition for Writ of Habeas Corpus.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
EX REL. JAMES F. TORRANCE
v.
JOSEPH SALZINGER, Warden of the
Dauphin County Prison

#278 Misc.
Docket #12

Petition for Writ of Habeas Corpus

The petition of James F. Torrance respectfully represents:

1. Petitioner, James F. Torrance, a citizen of the Commonwealth of Pennsylvania and of the United States and a resident of the County of Westmoreland, is now unjustly and unlawfully imprisoned and restrained of his liberty and detained under color of the authority of the Commonwealth in the custody of respondent, Joseph Salzinger, Warden of the Dauphin County Prison.

2. The sole claim and authority by virtue of which the petitioner is restrained of his liberty is the judgment of the Court of Quarter Sessions of Dauphin County, Pennsylvania at 216 January Sessions 1957 and at 220 January Sessions 1957, at which petitioner was sentenced to undergo imprisonment in the Dauphin County Prison for consecutive sentences of not less than one nor more than two years.

3. The indictment at No. 216 January Sessions 1957 charges that petitioner and several other persons engaged in a conspiracy to cheat and defraud the Penn-

sylvania Turnpike Commission by entering into a contract for unnecessary work, for which payment was made at an unconscionably high rate. The indictment at 220 January Sessions 1957 charges petitioner with misbehavior in office, for having approved the basic contract through which the conspiracy was allegedly implemented and for approving the payments made under said contract.

4. The imprisonment of the petitioner is contrary to the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment of the Constitution of the United States for the reason that at the trial of petitioner on said charges, there was no evidence introduced which, in reason, sustained a finding that petitioner had participated in such a conspiracy or of his guilt on any of said charges, and due process forbids the entry of a judgment based upon a finding for which there is no rational justification in the record.

5. Petitioner was convicted on July 25, 1957, after a trial which had lasted for several weeks and in which all of the charges against the various defendants had been consolidated and heard together. Thereafter, the Court of Quarter Sessions of Dauphin County refused petitioner's motion in arrest of judgment, which was based in part upon the contention that there was not sufficient evidence to support his conviction. Petitioner appealed to the Superior Court, which affirmed his conviction (except as to one count in the misbehavior in office indictment) by a four to three decision. The opinion of the Superior Court is reported at 190 Pa. Super. 179. Allocatur was granted by this Court, but the convictions were affirmed by a vote of four to two, on the opinion of the Superior Court. Chief Justice (then

Justice) Bell and Justice Benjamin R. Jones dissented. In his dissenting opinion, reported at 399 Pa. 387, Mr. Justice Bell stated, inter alia:

> "I agree with three judges of the Superior Court that the Commonwealth's evidence was legally insufficient to prove Torrance guilty beyond a reasonable doubt of the crime of fraudulent conspiracy of which he was convicted. *I am convinced* that the judgment against Torrance should be arrested and he should be discharged!" (Emphasis by the Court)

6. Petitioner made application to the Supreme Court of the United States for a writ of certiorari at No. 418 October Term 1960, but this was refused in November 1960 (364 U.S. 899). Re-hearing was also refused. In said applications to the United States Supreme Court for certiorari and re-hearing, petitioner did not raise the issue of the sufficiency of the evidence to sustain his conviction.

7. On January 27, 1961, petitioner filed a petition for the issuance of a writ of habeas corpus by the United States District Court for the Middle District of Pennsylvania. The Honorable Austin Staley, Circuit Judge, sitting as a United States District Judge, issued a rule to show cause why the writ should not be granted and at the same time, granted petitioner's application for his release from the Dauphin County Prison during the pendency of said rule. In a written memorandum opinion filed in connection therewith, Judge Staley stated, inter alia:

> "At the hearing before me, Dr. Vincent B. Hall testified that he had been treating petitioner since 1946, that his patient was a man 73 years of age,

suffering from congestive heart failure and advanced hardening of the arteries, that the slightest exertion causes angina pains, that he is a 'candidate for sudden death' and that confinement probably would produce such emotional strain as to gravely aggravate and advance his condition."

8. On June 30, 1961, the U. S. District Court dismissed petitioner's application for a writ of habeas corpus. Upon application of respondent, petitioner's bail was revoked, and he has been continuously confined in the Dauphin County Prison since on or about July 19, 1961.

9. Petitioner filed an appeal to the Court of Appeals for the Third Circuit from the refusal of the District Court to issue a writ of habeas corpus, and on January 10, 1962 the Court of Appeals affirmed the refusal.

10. In the federal proceedings, petitioner contended, among other things, that the record at his trial was so lacking in evidence probative of his guilt that his conviction could not be squared with the requirements of due process of law. Respondent contended, inter alia, that the federal courts were without jurisdiction to entertain petitioner's application for a writ of habeas corpus on such ground because petitioner had failed to exhaust his state remedies on that issue. The Court of Appeals sustained this contention stating:

"Only very recently has the Supreme Court undertaken to set aside state convictions as inconsistent with due process of law because they were not supported by proof of some essential element of the alleged crime. Garner v. Louisiana, Dec. 11, 1961, 30 U.S.L. Week 4070; Thompson v. City of

Louisville, 1960, 362 U.S. 199. Indeed, both of the cited cases were decided after the Supreme Court of Pennsylvania heard petitioner's direct appeal. This chronology may well explain the fact that in the state appellate courts Torrance failed to claim that lack of supporting evidence made his conviction a denial of due process of law. Thereafter, no such claim was made, or could properly have been made for the first time, in petitioner's application to the Supreme Court of the United States for a writ of certiorari. In these circumstances, we think petitioner has not satisfied the requirement of Section 2254 of Title 28, U.S. Code, that, in the absence of special excuse, he shall exhaust available state remedies before seeking habeas corpus in a federal court. *In this connection, it is clear that Pennsylvania practice permits such a constitutional issue as is now newly raised by way of federal habeas corpus to be asserted by habeas corpus in a state court.* See, e.g., Commonwealth ex rel. Haines v. Banmiller, 1958, 393 Pa. 439, 143 A.2d 661; Commonwealth ex rel. Spader v. Myers, 1958, 187 Pa. Super. 654, 145 A2d 870. *If there is substance to the present claim, proper deference to Pennsylvania dictates that the state courts be asked to consider the application of the rulings of the Thompson and Garner cases to the facts of the present case before we do so.* The newness of those decisions emphasizes the propriety of this course. Accordingly, we rule that the petitioner has not exhausted his state remedies with reference to this constitutional claim and, therefore, that it is not ripe for federal adjudication." (emphasis added)

11. Inasmuch as the Commonwealth, by invoking the rule of comity, has dissuaded the U. S. Court of Appeals from considering the merits of this issue, petitioner is entitled in right and in justice, to have the merits of said issue now heard and decided by the State courts.

12. It is desirable and appropriate that this Court should take original jurisdiction of this application for the following reasons, among others:

(a) Inasmuch as this Court affirmed the denial of petitioner's motion in arrest of judgment, it is improbable that any lower court would or should seriously reexamine the question of the sufficiency of the evidence to support a finding of petitioner's guilt, and therefore a petition for writ of habeas corpus to any lower court would be futile and nugatory.

(b) On the other hand, notwithstanding this Court's affirmance of petitioner's conviction, it should nevertheless examine the issue of the sufficiency of said evidence. Because of serious factual misstatements and misrepresentations concerning the evidence which appeared in the briefs on the appeal from petitioner's conviction, the decision of the Court was not made on "a balanced order of facts exactly and fairly stated" as is required in questions involving due process of law. (*Rochin v. California*, 342 U.S. 165, 172) The earlier decision of this Court was made before the decisions of the United States Supreme Court in *Thompson v. City of Louisville*, 362 U.S. 199 and *Garner v. Louisiana*, December 11, 1961, 30 U.S. Law Week 4070, and

consequently, the issues earlier presented were not evaluated and decided in the focus of a serious constitutional problem. As a result, the earlier determination of this Court was tragically erroneous. Therefore, this Court should issue the writ to remedy this injustice, invoking the rule, stated by Mr. Justice Harlan in *Chessman v. Teets,* 354 U.S. 156 at 165:

> ". . . [T]he overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist . . . We must be deaf to all suggestions that a valid appeal to the Constitution . . . comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands."

(c) After a long life of dedicated service to his community and his state, petitioner is advanced in years and declining in health. He has served many months of imprisonment for a sentence unjustly imposed for a crime of which he is innocent. Delay in getting a definitive determination of the merits of his case will jeopardize the possibility of his obtaining vindication during his lifetime.

(d) This proceeding will not require the taking of testimony inasmuch as all of the matters raised by this petition can be decided upon the record on appeal already before this Court in Commonwealth v. Torrance at No. 42 May Term 1960.

Wherefore petitioner prays that this Court proceed by original jurisdiction and that a rule issue directed to respondent to show cause why a writ of habeas corpus should not be granted, returnable at such early date as the Court may direct.

ELDER W. MARSHALL
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OCTOBER TERM, 1961

NO. 855

COMMONWEALTH EX. REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, Respondent

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

OPINIONS OF COURTS BELOW AND IN COMPANION CASES SEPARATELY PRESENTED PURSUANT TO RULE 23 (i)

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TABLE OF CONTENTS

	PAGE
Opinion of Court of Appeals for Third Circuit, in Support of Judgment Below. (Not yet reported)	1a
Opinion of District Court for Middle District of Pennsylvania, in Support of Order Refusing Habeas Corpus. (Officially Reported in 195 F. Supp. 804)	9a
* Opinion of Supreme Court of Pennsylvania, Refusing Habeas Corpus. (On Original Jurisdiction) (Officially Reported at 406 Pa. 268; 177 At. 2d 619)	41a
Opinions of Superior Court of Pennsylvania Affirming Criminal Convictions. (Officially Reported at 190 Pa. Super. 179; 154 At. 2d 57)	45a
Opinions of Supreme Court of Pennsylvania Affirming Criminal Convictions. (Officially Reported at 399 Pa. 387, 160 At. 23 407)	177a

* In support of Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,685

JAMES F. TORRANCE, *Appellant*
v.
JOSEPH SALZINGER, WARDEN OF THE DAUPHIN COUNTY PRISON; AND WESLEY M. BARRICK, SHERIFF OF DAUPHIN COUNTY, PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued September 22, 1961

Before:
GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of Court of Appeals

(Filed January 10, 1962)

By HASTIE, *Circuit Judge.*

This is an appeal by a state prisoner, James Torrance, from a federal district court's denial of his application for a writ of habeas corpus. Petitioner is confined pursuant to sentences imposed by a Pennsylvania court upon convictions of misbehavior in public office and conspiracy to defraud the Pennsylvania Turnpike Commission. The charges grew out of contracts entered into by the Pennsylvania Turnpike Commission, of which petitioner was a long time member and sometime secretary-treasurer.

Nine persons, several of whom were officials of the Turnpike Commission, were tried together. Five were convicted and four acquitted. The Superior Court and the State Supreme Court, affirmed the convictions involved here. *Commonwealth v. Evans, et al.*, 1959, 190 Pa. Super. 179, 154 A.2d 57, *aff'd*, 1960, 399 Pa. 387, 160 A.2d 407. Certiorari was denied by the Supreme Court of the United States, 1960, 364 U.S. 899.

After his commitment, Torrance filed the present petition for habeas corpus in the appropriate federal district court alleging that various occurrences during or connected with his trial were so fundamentally unfair that his convictions should be set aside as denying due process of law. The facts upon which the petitioner predicates his contentions appear in the trial record. The district court analyzed these contentions in detail and concluded that there had been no denial of due process. M.D. Pa. 1961, 195 F. Supp. 804. We are now asked to review three of the claims rejected in that decision.

It is petitioner's first contention that prejudicial publicity, beginning at the time of the initial grand jury investigation of the Pennsylvania Turnpike scandals, so poisoned public opinion against him that his trial could not have been an essentially fair determination of his guilt or innocence. However, certain undisputed facts make it impossible for him to prevail on this point.

The searching voir dire examination of the prospective trial jurors, which extends over some two hundred typed pages of the trial transcript, affirmatively indicates that the jurors who tried this case were not prejudiced against the petitioner. Two of the twelve who

found petitioner guilty denied having read or heard anything about the Turnpike scandals. Nine others denied having formed any opinion about the case. One said that he had formed an opinion, but not one that would prevent him from rendering a verdict solely upon the trial evidence. Nothing was disclosed on the voir dire which cast doubt upon the credibility of these assertions of open-mindedness.

Petitioner's showing is deficient in another way. It does not appear that derogatory or hostile and inflammatory statements about the petitioner were circulated during or shortly before the trial in or near the community where the jurors lived. Yet, it is only on a convincing showing that the accused has been tried while the public mind was poisoned against him by current and pervasive derogatory publicity that convictions have been set aside on such claims as the petitioner asserts here. *Irvin v. Dowd*, 1961, 366 U.S. 717; *Shepherd v. Florida*, 1951, 341 U.S. 50 (*concurring opinion*); *Delaney v. United States*, 1st Cir. 1952, 199 F.2d 107.

Petitioner places his principal reliance upon two television appearances of the Governor of Pennsylvania which occurred and received great publicity some eight months before the trial, when the investigating grand jury was just beginning its inquiry into the Turnpike scandals. For the text of the Governor's statements, see dissenting opinion in *Commonwealth v. Evans*, 1959, 190 Pa. Super. 179, 281-85, n.1, 154 A.2d 57, 109-11, n.1. Undoubtedly, the Governor's statements were dramatic and denunciatory. He made a political issue of the alleged Turnpike scandals. He asserted that the State had been cheated of large sums of money by members of a

rival political party who had been appointed to office during a previous administration. He emphatically condemned the perpetrators of the alleged wrong, but did not identify the petitioner as one of them. The petitioner argues that these statements are similar to statements by public prosecutors and other public officials that have led to the invalidation of other convictions. *E.g., Shepherd v. Florida, supra; Delaney v. United States, supra.* However, on their face the statements in those cases were much more extreme and inflammatory than any of the things said by the Governor of Pennsylvania concerning the Turnpike scandals.

Moreover, newspaper stories affirmatively declared that the subsequently complaining individuals were guilty and denounced and excoriated them. Here, the Governor made no mention of the petitioner. Indeed, he made it clear that the guilt or innocence of particular parties would be determined in the regular course of criminal investigation and trial. In addition, the statements in the cited cases were made so near to the time of trial that they must have been fresh in the public mind. In contrast, the Governor's statement here was made some three months before the defendant was even indicted.[1] It antedated his trial by almost eight months

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1. Assuming arguendo that the investigating grand jury was influenced by the Governor's statements, it does not follow that there was bias in the indicting of petitioner three months later. For the intervening procedure prescribed in such a case is an elaborate one involving a court, the prosecutor and a second grand jury. The prosecutor is required to obtain the approval of the Court of Quarter Sessions before drafting and presenting an indictment based on the investigating grand jury's presentment. Then this indictment must be con-

and thus could not have constituted fresh incitement to prospective trial jurors. Compare *Stroble v. California*, 1952, 343 U.S. 181, where a six week interval between particular publicity and trial was deemed significant. True, during the intervening months the media of public information had mentioned the Governor's past statements from time to time in the course of normal publicity about the pending criminal cases. But, at most, these references may have served to remind some readers that the Governor had strongly expressed the view that there had been criminal conduct in the administration of the Pennsylvania Turnpike and had roundly condemned this wrongdoing.

It is also noteworthy that at the trial itself, after the court refused to quash the indictments, none of the several outstanding members of the bar who represented the defendants moved for a continuance or postponement on the ground that adverse publicity had made a fair trial impossible at that time. Rather, they contented themselves with a long and searching voir dire examination of prospective jurors.

One additional consideration deserves mention. Petitioner was one of the nine defendants who were tried

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sidered and voted by a second grand jury before it becomes the formal accusation upon which a criminal trial is held. There is no showing, not even a claim, that bias infected this entire series of decisions by mutually independent public functionaries.

Moreover, whatever view one may take of the claim of prejudice in the indicting process, it is difficult to see how the ultimate conviction of the accused can be a denial of due process so long as the case is tried to an unbiased petit jury. *Geagan v. Gavin*, D. Mass. 1960, 181 F. Supp. 466, *aff'd*, 1st Cir. 1961, 292 F.2d 244.

together. Five were convicted, four were acquitted. This differentiation suggests that the publicity preceding the trial did not create any serious community prejudice against the entire group of accused persons. And there had been no public condemnation of petitioner as playing a leading or dominant role in the alleged conspiracy such as would lead to a conclusion that greater prejudice had been aroused against him than against those who were acquitted.

Next, petitioner claims that his trial was made essentially unfair by the introduction in evidence of the lengthy interrogation of a co-defendant, John Paul, before the grand jury that investigated the Turnpike scandals. The reading of the Paul statement required almost a full trial day. The statement contained a few admissions relevant to Paul's alleged participation in the conspiracy. There were only passing references to Torrance, none of them notably prejudicial or incriminating. At most Paul's testimony may have created an overall impression that Torrance as a member and officer of the Turnpike Commission participated in a number of the transactions upon which the indictments were founded. The trial judge dealt with this situation by clearly instructing the jury to consider Paul's statement as evidence against Paul alone.

In many cases it is debatable whether a jury does or psychologically can comply with instructions that testimony be used against one defendant, but not against another. See *Blumenthal v. United States*, 1947, 332 U.S. 339, 359-60. Yet, in joint trials, particularly in conspiracy cases, it has repeatedly been held not to be reversible error, much less a denial of constitutional right, to admit

damaging evidence with instructions that the jury consider it as proof against one defendant, but disregard its incriminating effect upon another defendant. *E.g., Delli Paoli v. United States,* 1957, 352 U.S. 232; *United States v. Griffin,* 3d Cir. 1949, 176 F.2d 727. Only in the clearest cases of gross and easily avoidable prejudice to a co-defendant has reversible error been found in this method of handling evidence. *E.g., United States v. Jacangelo,* 3d Cir. 1960, 281 F.2d 574. Grave prejudice is not apparent in this case. Indeed, so slight was the impact of Paul's admissions, that he himself was acquitted. With reference to the conspiracy charge, the jury apparently credited Paul's picture of the Turnpike Commission as dominated by defendant Evans with Paul duped and acting as directed by Evans. But no essentially more damaging picture of Torrance's relation to the conspiracy emerged from Paul's testimony. Certainly, no constitutional right of petitioner was infringed by the limited admission of this evidence.

Petitioner's final contention is that the record is so lacking in evidence probative of his guilt that his conviction cannot be squared with the requirements of due process of law.

Only very recently has the Supreme Court undertaken to set aside state convictions as inconsistent with due process of law because they were not supported by proof of some essential element of the alleged crime. *Garner v. Louisiana,* Dec. 11, 1961, 30 U.S.L. WEEK 4070; *Thompson v. City of Louisville,* 1960, 362 U.S. 199. Indeed, both of the cited cases were decided after the Supreme Court of Pennsylvania heard petitioner's direct appeal. This chronology may well explain the fact that

in the state appellate courts Torrance failed to claim that lack of supporting evidence made his conviction a denial of due process of law. Thereafter, no such claim was made, or could properly have been made for the first time, in petitioner's application to the Supreme Court of the United States for a writ of certiorari. In these circumstances, we think petitioner has not satisfied the requirement of Section 2254 of Title 28, U.S. Code, that, in the absence of special excuse, he shall exhaust available state remedies before seeking habeas corpus in a federal court. In this connection, it is clear that Pennsylvania practice permits such a constitutional issue as is now newly raised by way of federal habeas corpus to be asserted by habeas corpus in a state court. See, *e.g.*, *Commonwealth ex rel. Haines v. Banmiller*, 1958, 393 Pa. 439, 143 A.2d 661; *Commonwealth ex rel. Spader v. Myers*, 1958, 187 Pa. Super. 654, 145 A.2d 870. If there is substance to the present claim, proper deference to Pennsylvania dictates that the state courts be asked to consider the application of the rulings of the *Thompson* and *Garner* cases to the facts of the present case before we do so. The newness of those decisions emphasizes the propriety of this course. Accordingly, we rule that the petitioner has not exhausted his state remedies with reference to this constitutional claim and, therefore, that it is not ripe for federal adjudication.

The judgment denying petitioner a writ of habeas corpus will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES F. TORRANCE, Plaintiff

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, and WESLEY M. BARRICK, Sheriff of Dauphin County, Pennsylvania, Defendants

Habeas Corpus No. 397

Opinion of District Court

This is an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner is presently at large on bail by Order of a Circuit Court Judge pending the disposition of this matter.

On June 5, 1958, petitioner was sentenced to undergo imprisonment in the Dauphin County, Pennsylvania, prison for consecutive sentences of not less than one nor more than two years pursuant to a verdict of guilty entered on July 24, 1957, in said Dauphin County Court of Quarter Sessions on two separate indictments charging:

1. Conspiracy to cheat and defraud the Pennsylvania Turnpike Commission.

2. Misbehavior in office.

Petitioner appealed to the Pennsylvania Superior Court which affirmed his conviction except as to one count in the misbehavior in office indictment, 190 Pa. Superior Ct. 179. The Pennsylvania Supreme Court granted allocatur but affirmed the conviction, 399 Pa. 387.

Petitioner then made application to the Supreme Court of the United States for Writ of Certiorari which was denied November 21, 1960, 364 U.S. 899, and a rehearing was denied January 9, 1960, 364 U.S. 939.

In his original and supplemental petitions, petitioner alleges that he was denied due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution in eight respects which were set forth in Paragraph 5 of the petition and which have been condensed as hereinafter set forth and will be considered seriatim, beginning with 5(b). Discussion on 5(a) and 5(h) will be reserved until the last.

REASON 5 (b)

The District Attorney of Dauphin County and a Special Deputy Attorney General of the Commonwealth of Pennsylvania intruded upon said investigating grand jury and illegally and erroneously instructed them on the law.

The Superior Court of Pennsylvania (Commonwealth v. Evans et al., 190 Pa. Superior Ct. 179, 198) said:

> "The allegation of intrusion by the district attorney and the special deputy attorney general is likewise extraneous to the indictments and is without merit.
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> " 'It is the duty of the district attorney . . . to attend upon a grand jury, lay before them all matters upon which they are to pass, aid them in the examination of witnesses and give general instructions as may be required. It is highly im-

proper, however, for the district attorney . . . to take part in the deliberations of a grand jury, as it is their duty to consider alone the evidence and apply it to the case.' *Com. v. Brownmiller,* supra, 141 Pa. Superior Ct. 107, 113, 14 A.2d 907, 910. The record shows that the district attorney and the deputy attorney general properly attended upon the investigating grand jury giving only general advice. There was no improper conduct or intrustion upon its deliberations."

The Court there also said:

"A further consideration is that the investigating grand jury and the indicting grand jury are separate legal bodies. Although both may have considered the same alleged crimes involving the same individuals, their proceedings, deliberations, and presentments are distinct. Extraneous matters affecting one may not influence the other, and irregularities before one are not always present in the other; the two bodies are unrelated in this respect. Consequently, an indictment by a regular grand jury is not necessarily tainted by some irregularity or improper influence alleged to have affected the investigating grand jury. *Com. v. Gross,* supra, 172 Pa. Superior Ct. 85, 90, 91, 92 A. 2d 251. At least, the irregularity or improper influence must be shown to have also affected the indicting grand jury. Nothing of this nature appears in this case. 'No matter how irregular the investigatory proceedings before the grand jury may have been, the presentment at least furnished the district attorney with information sufficient to justify his application for leave to present a district attorney's bill.' Com.

v. Brownmiller, 137 Pa. Superior Ct. 261, 267, 9 A. 2d 155, 158."

As an issue of fact there was ample basis for the determination thus made by the Pennsylvania court. Moreover, the Court's discussion pinpoints the fact that petitioner is referring to the investigating grand jury, not the regular indicting grand jury. There was an indictment duly returned by a regular grand jury. There was an investigating grand jury serving a purpose under State practice somewhat akin to the preliminary hearing before a United States Commissioner in Federal practice for determination of probably cause. That no constitutional issue for consideration in habeas corpus is involved is forcefully demonstrated by Judge Parker's remark in *Barber v. United States*, 4 Cir., 142 F. 2d 805, 807, that "The only purpose of a preliminary hearing is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury; and, after a bill of indictment has been found, there is no occasion for such hearing."[1]

REASON 5 (c)

After presentments had been returned by the special investigating grand jury, the District Attorney of Dauphin County, without obtaining court approval as required by the law of Pennsylvania, presented indictments to the regular grand jury.

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[1] See also, Boone v. United States, 6 Cir., 1960 280 F. 2d 911; United States ex rel. Bogish v. Tees, 3 Cir., 1954, 211 F. 2d 69, 72; Yodock v. United States, D.C.M.D. Pa., 1951, 97 F. Supp. 307, 310, aff. 196 F. 2d 1018; Barrett v. United States, 8 Cir., 1959, 270 F. 2d 772; United States ex rel. Mulhollen v. Cavell, D.C.W.D. Pa., 1959, 174 F. Supp. 923.

The Superior Court points out (Commonwealth v. Evans, et al., 190 Pa. Superior Ct. 179, 199) that "On January 21, 1957, the court entered an order that the district attorney 'prepare and submit to the regular January, 1957, Grand Jury now in sessions, bills of indictment covering all the matters contained in the Presentment of the Special Grand Jury of Investigation made to the court on Friday, January 18, 1957.'" This is fully borne out by the record. It was held that this "was sufficient leave of court for submission of the indictments." Aside from any lack of merit in petitioner's contention, such determination of the State law was purely a matter for the State courts and involves no constitutional question which might be invoked in habeas corpus, Costello v. United States, 350 U.S. 359; Knewal v. Egan, 268 U.S. 442.

REASON 5 (d)

The indictment at No. 216 January Sessions 1957 charged petitioner and certain others with conspiracy to cheat and defraud the Pennsylvania Turnpike Commission.

The indictment at No. 220 January Sessions 1957 charged petitioner with misbehavior in office.

The Court consolidated the trial of said charges against petitioner and others, with the trial of certain officers of Manu-Mine Company upon charges of obtaining money by false pretense at No. 218 January Sessions 1957.

The consolidation of the trial upon said indictments was done over the objections of the petitioner and resulted in a trial lacking in due process.

On this matter the Superior Court of Pennsylvania stated, inter alia: (190 Pa. Superior Ct. 179, 230)

> "Upon motion of the district attorney, to which the defendants objected, the court permitted the consolidation of the indictments for trial. The general rule is that the court in its discretion may consolidate two or more indictments for trial where the offenses charged are similar, related, or connected unless substantial prejudice will result to the accused. *Com. v. Krzesniak*, 180 Pa. Superior Ct. 560, 567, 119 A.2d 617. The consolidation of a conspiracy indictment with other related charges will normally not be disturbed where it appears the evidence that was admissible on the crimes charged in the other indictments tended to support the conspiracy charge. *Com. v. Dixon*, 179 Pa. Superior Ct. 1, 5, 115 A.2d 811. The consolidation for trial of indictments charging conspiracy and misdeameanor in office has been recognized. *Com. v. Ackerman*, supra, 176 Pa. Superior Ct. 80, 85, 106 A.2d 886. And, in general, defendants charged with conspiracy should be tried together. *Com. v. Antico*, 146 Pa. Superior Ct. 293, 311, 22 A.2d 204."

On the record this Court could not say that the trial court and the appellate courts of Pennsylvania erred in finding that petitioner was not prejudiced by a consolidation of the indictments for trial. However, even at best, this can rise no higher than a question of law involving the exercise of the trial court's discretion (Schaffer et al. v. United States, 362 U.S. 511) and does not encompass any due process issue for habeas corpus, Brandenburg v. Steele, 8 Cir., 177 F. 2d 279. The mere fact that there has been unsuccessful recourse to appeal

does not make habeas corpus available as a further appellate step, United States ex rel. Saunders v. Myers, 3 Cir., 276 F.2d 790; Wilson v. Lanagan, D.C.Mass., 19 F. Supp. 870.

REASON 5 (e)

The trial judge permitted the Commonwealth to read to the jury the lengthy transcript of the testimony before the grand jury of one of petitioner's co-defendants.

Petitioner seeks to assign numerous reasons why the admission at the trial of the testimony of a defendant, John D. Paul (which testimony was given before the investigating grand jury and contained references to the defendant Torrance) was error. Defendant Paul at no time during the trial took the stand to testify. The trial started June 4, 1957, and the Commonwealth rested on June 28, 1957. Paul's statement, that is his testimony before the investigating grand jury, which of course was after the termination of any conspiracy, was introduced in evidence and the reading to the trial jury of such statement began on June 27, 1957. The admissibility of this evidence was carefully considered in the proceedings on appeal in the State courts and dealt with, especially by the Superior Court, at some length. In 190 Pa. Superior Ct. 170, 244, that Court said:

"Defendants allege that it was prejudicial error for the trial judge to admit into evidence the investigating grand jury testimony of John D. Paul, one of the defendants who was acquitted by the jury. The testimony was presented to the jury as an admission against Paul. The Commonwealth offered it

against all defendants, but the trial judge was of the opinion that testimony given before the investigating grand jury was not in furtherance of the conspiracy and did not promote or advance the common unlawful object. Therefore, before the testimony was introduced, the jury was instructed that it was restricted to John D. Paul and was not to be considered against any of the other defendants. The testimony was lengthy. It is the contention of defendants that notwithstanding the fact that the trial judge instructed the jury that this testimony was to be considered as an admission against John D. Paul only, it nevertheless contained material which was so prejudicial to the other defendants as to have been improperly admitted. It is argued that such testimony of Paul was not admissible at all because it was not an admission but an attempt by Paul to exculpate himself while inculpating the other defendants; that those portions containing references to the other defendants should not have been read to the jury along with the admissions of Paul; and that the trial judge, although he gave cautionary instructions to the jury when the testimony was received and in the course of his charge, nevertheless improperly utilized the testimony to the prejudice of the other defendants in discussing their role in the conspiracy and fraud.

The testimony of Paul was a detailed recitation of his knowledge of the functioning of the Turnpike Commission, particularly with reference to the Manu-Mine contract. As such it necessarily would involve statements concerning the other defendants.

The testimony was certainly admissible against Paul. It contained admissions notwithstanding the fact that it was not an unqualified confession of guilt. 'An "admission" as applied to criminal cases has been defined as a "statement by defendant of a fact or facts pertinent to the issues and tending, in connection with proof of other facts or circumstances, to prove the guilt, . . . but which is, of itself, insufficient to authorize conviction; it is a circumstance which requires the aid of further testimony to generate a reasonable conclusion of guilt." . . . Voluntary statements made by a defendant, although they may not amount to a confession of guilt, can be used against him if they tend to explain issues on trial, . . .' *Com. v. Elliott*, 292 Pa. 16, 20, 140 A. 537, 538. Generally, where the Commonwealth desires to prove certain admissions of a defendant, it is not necessary to put in evidence his entire previous testimony. *Com. v. House*, 6 Pa. Superior Ct. 92, 104. But the entire testimony may be received as an admission where the defendant is charged with participation in a complicated criminal endeavor involving many related facts, incidents, and circumstances, most of which are set forth in the prior testimony. In such a case his entire testimony may be viewed as a whole to ascertain the full extent of defendant's admission as to his participation in the criminal plot. The testimony of Paul provided a thorough picture of this complicated conspiracy and his participation therein, whether innocent or guilty; it was properly admitted as a whole against him. The fact that the jury subsequently acquitted him does not retroactively affect the admissibility

of his prior testimony. *Com. v. Berman*, supra, 119 Pa. Superior Ct. 315, 323, 326, 181 A. 244.

"In a joint trial the acts and declarations of a conspirator made after the conspiracy has ended are admissible against that defendant so long as the jury is properly instructed on the limited purpose and effect of the admissions. This is true notwithstanding that the admission may make reference to the other defendants. Such was the situation in *Com. v. Berman*, supra, 119 Pa. Superior Ct. 315, 329, 181 A. 244. We there stated (page 329 of 119 Pa. Superior Ct., page 249 of 181 A.): 'A statement by one of several codefendants which is in the nature of a confession is admissible in evidence under proper instructions, although such a statement may indirectly influence the minds of the jury against the other defendants on trial. . . . The mere fact that evidence legally admissible against one of several defendants may prejudice his codefendant is no reason for its exclusion. . . . The Cummings statement set forth what he said he knew of the conspiracy charged, and his version of his connection with it. Such a voluntary statement by a defendant is admissible against him, although it may not contain an unqualified admission of guilt. . . . The statement by Cummings, that the scheme with which he was connected proved unfair and unethical and a scheme to defraud customers, was relevant and admissible, although he endeavored to impute the fraud to what he called the "Berman group." It might properly be inferred from his statement that he knew more about the scheme than he disclosed. The evidence being relevant, it was immaterial that

the statement contained an expression of opinion by Cummings which might be detrimental to the appellant, a codefendant; and it was admissible if sufficiently limited by proper instructions.' See, also, *Com. v. Dolan*, 155 Pa. Superior Ct. 453, 458, 38 A. 2d 497; *United States v. Griffin*, 176 F. 2d 727, 729, certiorari denied 338 U.S. 952, 70 S. Ct. 478, 94 L. Ed. 588.

The contention that, at the time the admission was offered, there was not sufficient other evidence of the conspiracy is without merit. The admission was introduced almost at the end of the Commonwealth's case. There was sufficient proof of the conspiracy at that time. As said in *Com. v. Zuern*, 16 Pa. Superior Ct. 588, 604: 'The proof of the conspiracy at the point in the trial when the declarations are sought to be introduced, need not be conclusive, but only slight, in order to permit the introduction.'

"At the inception of the reading of the testimony of John D. Paul, *the trial judge admonished the jury that 'this witness is about to be questioned concerning certain testimony alleged to have been given by one of the nine defendants in the conspiracy case, John D. Paul. The testimony you are about to hear, we emphasize, is restricted to John D. Paul alone. It applies to him alone and to no other defendant. You will keep that in mind as the testimony is given, and that applies in all of the cases that are before you for trial.' This admonition was repeated later at the request of defense counsel. In the charge the trial judge instructed the jury on at*

least five occasions that the testimony of John D. Paul was restricted to him alone and was not to be considered against the other defendants. In addition, at the request of Evans in his points for charge, the trial judge reiterated the admonition on two occasions. We think the instructions were adequate. There was sufficient evidence presented to substantiate the conviction of the four remaining defendants, unaffected by the admission of the Paul testimony. We do not believe that the circumstances are such that the jury disregarded the admonitions of the trial judge. See *Com. v. Fugmann,* supra, 330 Pa. 4, 17-19, 198 A. 99; *Com. v. Novak,* 165 Pa. Superior Ct. 576, 581, 69 A. 2d 186. The verdicts indicate otherwise." (Emphasis supplied.)

Such determination on the admissibility of the evidence finds support in the record. As a question of law, it was likewise a matter for the State court. As was stated in Anderson v. Heinze, 9 Cir., 1958, 258 F. 2d 479, 483:

> "Yet, with one exception, Anderson does not now dispute the determination of the district court that the instant application advances no new ground. This is the most significant fact to be drawn from the papers before us. The one exception has to do with the contention that the trial court erred in permitting use, at the trial, of a transcript of the preliminary hearing. But, assuming that this is a new ground (which it is not), it is one which presents no federal question. . . ."

Nor is the State law on this matter of evidence at variance with Federal law, United States v. Griffin, 3 Cir.,

176 F. 2d 727; Delli Paoli v. United States, 352 U. S. 232; United States v. Gottfried et al., 2 Cir., 165 F. 2d 360, 367. But to disagree with the State court's determination in a matter of this kind, even were we so inclined,[2] is not the function of this Court in habeas corpus. As was stated in United States ex rel. Saunders v. Myers, 3 Cir., 1960, 276 F. 2d 790, 791:

> ". . . what appellant seeks to have this court do is to pass on the admissibility of the testimony and, assuming we could determine that it should have been excluded, to weigh the sufficiency of the remaining evidence. We can do neither. With certain exceptions, see Sunal v. Large, 1947, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982, none of which are present, admissibility and sufficiency of evidence are matters for appeal, not habeas corpus. (Cases cited.) Because, as here, there has been unsuccessful recourse to appeal does not make habeas corpus available as a further appellate step. Federal courts may not promulgate rules of evidence for state courts under the guise of preserving due process. The record before us does not reveal that Saunders '* * * has been dealt with with such a lack of fairness that we may say he has not been given due process of law.' (Cases cited.)"

REASONS 5 (f) AND (g)

(f) The trial court allowed the prosecution to present five rebuttal witnesses to testify to their own conspiracies and crimes unrelated to the charges against petitioner, which testimony was

2. See Judge Learned Hand's comment in United States v. Gottfried et al., supra.

intended to and served only to inflame and prejudice the jury.

(g) The trial court permitted witnesses to read to the jury statutes of the Commonwealth of Pennsylvania and to offer their interpretations and constructions thereof and in addition illegally restricted petitioner's right to cross-examine said witnesses.

As to these matters the State appellate court (190 Pa. Superior Ct. 179, at 235, 237, 238, and 239) commented:

". . . Another instance concerned the testimony of five Manu-Mine inspectors as to certain irregularities in the slushing program. This testimony, offered in rebuttal, was limited to contradicting certain defense witnesses. It was thoroughly and repeatedly explained to the jury that it was received solely for that limited purpose. We cannot see how Stickler and Landsidle were prejudiced under the circumstances. The instructions were adequate and clear. For the most part the evidence demonstrated the general course of conduct tending to the same general end. Com. v. Dixon, supra, 179 Pa. Superior Ct. 1, 5, 115 A. 2d 811.

* * * * * * *

"Defendants next allege certain errors in the admission of evidence.

"Defendants contend that the trial judge erred in permitting two witnesses to testify as to the law of Pennsylvania applicable to the commission and its power to contract. At the beginning of the trial,

the Commonwealth called Harrington Adams, a deputy attorney general, who read into evidence section 4 of the Act of May 21, 1937, P. L. 774, No. 211, 36 PS §652d, which created the Pennsylvania Turnpike Commission and made it an instrumentality of the Commonwealth. Adams also read the provision in section 4 giving the commission the power to contract, with the proviso that contracts relating to construction shall be approved by the Department of Highways and that such construction be under the supervision of the Department of Highways. Adams then read into evidence the portions of the Act of September 27, 1961, P. L. 1430, as amended, 36 PS §660.2, 660.6, which created the Northeastern Extension of the Pennsylvania Turnpike and gave the commission the power to contract for its construction subject to the same approval and supervision by the Department of Highways.

* * * * * * *

"It is the general rule, as contended by defendants, that the trial judge, not expert witnesses, should give instructions to the jury on domestic law and its application to the case. Com. v. Giltinen, 64 Pa. 100, 105; Com. v. Walker, 178 Pa. Superior Ct. 522, 528, 116 A. 2d 230. But we perceive no harmful effect in having the actual provisions of the law read into evidence, as here, from the pamphlet laws. Contrary to defense contentions, the witnesses, by reading the provisions to the jury, did not give an opinion or interpretation of the laws as applied to this case. . . ."

As the Court correctly noted, the rebuttal testimony clearly had reference to two other defendants and had no pertinency as to Torrance.

In Lisenba v. California, 314 U.S. 219, the extreme situation of a California State court sentence of death for a conviction for murder was involved and the attack was on the admission of a confession. Justice Roberts' observations (Pages 236, 238 and 239) are pertinent, namely:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. . . .
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> ". . . Furthermore, in passing on the petitioner's claim, the Supreme Court of the State found no violation of the Fourteenth Amendment. Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.
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> * * * * * * *
>
> ". . . if federal power is invoked to set aside what California regards as a fair trial, it must be plain that a federal right has been invaded."

The matters sought to be raised here are clearly within the realm of admissibility of evidence under State law of such a nature as to have no connotation of Federal constitutional involvement. What we are dealing with in this habeas corpus proceeding is not the innocence or guilt of Torrance but whether his constitutional rights were preserved, Moore v. Dempsey, 261 U. S. 86, 88. We do not have before us any of the exceptions, Sunal v. Large, 332 U.S. 174, to the general rule that this Court on a habeas corpus from a State conviction does not pass on the admissibility of the testimony or, assuming that it should have been excluded, to weigh the sufficiency of the remaining evidence, United States ex rel. Saunders v. Myers, 3 Cir., 1960, 276 F. 2d 790. The petitioner's guilt or innocence is for the State court and the jury that tried him and "The District Court may not, on a petition for habeas corpus, usurp the function of the state jury by determining, de novo, the innocence or guilt of a prisoner convicted under state process." United States ex rel. Helwig v. Maroney, 3 Cir. 271 F. 2d 329, 332; United States ex rel. Mayo v. Burke, D.C.E.D. Pa., 93 F. Supp. 490, 495, aff. 3 Cir., 185 F. 2d 405, cert. den. 341 U.S. 922, rehearing den. 341 U.S. 943; United States ex rel. Fletcher v. Cavell, D.C.W.D.Pa., 183 F. Supp. 335, 337.

REASON 5 (a)

That the Governor made inflammatory remarks on the evening of October 22, 1956, when the investigating grand jury was convened and thereafter which tended to prejudice the grand jury against the defendant.

Opinion of District Court.

In an opinion to No. 216 January Session of the Court of Quarter Sessions of Dauphin County, Pennsylvania, (70 Dauphin County Reporter 197, 205, 206) Judge Neely dismissed motions to quash the indictment filed by the several defendants, including that filed by defendant Torrance. In answer to the above reason the Court said:

"The defendant complains that the Governor made an 'inflammatory and improper speech' over television in the Harrisburg area which prejudiced the Special Grand Jury. The speech did have a highly political flavor. It is set forth in the petition that the Governor's speech was delivered on October 22, 1956, the day the Grand Jury convened, and again on October 23. The court charged the investigatory Grand Jury as follows:

"'* * * These matters are being submitted to you for investigation at a time when partisanship runs high and in the midst of a Presidential Election. The petition was so presented and the Court had no recourse except to submit the matter to you at this time. We instruct you, however, that you are to treat the convening of this Grand Jury and the current political campaign as a matter of pure coincidence.

"'There has been wide publicity in the press and other media of communication concerning the investigation. We have mentioned this publicity at this time in our charge to emphasize the importance to you of divorcing your deliberations from political turmoil and clamor, and reaching your conclusions on the evidence submitted to you, uninfluenced by

any partnership or political considerations whatsoever.'

"We have no reason to believe that this Grand Jury disregarded this admonition because of these political speeches made at the very outset of their investigation and before they had received the great quantity of testimony that was submitted to them. The petition of the defendant on this aspect of the case is clearly based on 'allegations of extraneous factors,' and as stated in *Commonwealth v. Gross*, supra, 172 Pa. Super. Ct. 85, at page 92, a Court should not sustain a motion to quash based upon such factors 'except in a clear case where it is convinced that harm has been done to the defendant.' We cannot reach the conclusion that such harm was done the defendant as to require the quashing of this indictment because of this political speech. We must bear in mind that the presentment recited the facts upon which the Grand Jury made their finding of probable cause, and the factual information was sufficient to justify the application for the District Attorney's bill: *Commonwealth v. Brownmiller*, et al., supra, 137 Pa. Super. Ct. 261, 267."

The action of Judge Neely in refusing to quash the indictment for the reason, inter alia, above quoted, was approved by the Pennsylvania Superior Court (190 Pa. Superior Ct. 179, 196) as follows:

"On October 22, 1956, upon the petition of the Attorney General of the Commonwealth, dated September 1, 1956, in which the District Attorney of Dauphin County had joined, a special investigating grand jury was convened. The matters disclosed by

the presentment of the investigating grand jury formed the basis for the bills of indictment submitted, at the direction of the court, to the regular grand jury for the January Sessions of 1957. On January 23, 1957, the regular grand jury returned indictments against the nine defendants, five of whom have appealed after conviction, and four of whom were acquitted. Defendants moved to quash the indictments, alleging that on the evening that the investigating grand jury convened and on the following evening the Governor of the Commonwealth, in broadcasts over two Harrisburg television stations, made an inflammatory speech and remarks, and that the district attorney and the special deputy attorney general had intruded upon the deliberations of the investigating grand jury which was prejudicial to defendants. The motions to quash were denied in an opinion by Judge NEELY; we believe this was proper:

"It is significant that the motions to quash, with the exception of that filed by defendant Torrance, do not question the form or sufficiency of the indictments, and that the matters alleged as prejudicial are extraneous to the indictments and relate principally to the investigating grand jury and not to the indicting grand jury. Ordinarily, alleged defects or irregularities in the proceedings preliminary or antecedent to the indictment may not be considered on a motion to quash. *Com. v. Gross*, 172 Pa. Superior Ct. 85, 92, 92 A.2d 251. A motion to quash which is based upon the allegation of extraneous factors should not be sustained unless it clearly appears that the defendant has been harmed

by some improper conduct that interfered with his substantial rights. The court below concluded that the remarks of the Governor at the time the investigating grand jury convened were not such as to harm the defendants in the subsequent return of the indictments. In this respect the court considered not only the allegations of defendants, but also the fact that the investigating grand jury was specifically admonished in the charge of the court to divorce its deliberations from any political turmoil, public clamor, or publicity, and to reach its conclusions on the basis of the evidence presented 'uninfluenced by any partisanship or political considerations whatsoever.' There is nothing to indicate that the investigating grand jury did not properly follow this instruction. *Com. v. Brownmiller,* 141 Pa. Superior Ct. 107, 113, 14 A.2d 907. Nor is there any indication that the grand jurors heard such irrelevant remarks. If they had it would not necessarily invalidate the subsequent indictments based upon other and proper evidence. *Com. v. Gross,* supra, 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251."

I agree with the Superior Court that the action of Judge Neely in denying the motion to quash the indictment was proper. The special investigating grand jury was convened October 22, 1956, and it was on this date that the alleged offending speech of the Governor of Pennsylvania was made. The presentment of the special grand jury of investigation was made to the Court on January 18, 1957. The regular grand jury returned the indictments on January 23, 1957. The trial began on

June 4, 1957, approximately eight month's after the Governor's speech.

In Reynolds v. United States, 98 U.S. 145, 155, the Court said:

> "... Mr. Chief Justice Marshall, in *Burr's* Trial (1 Burr's Trial, 416), states the rule to be that 'light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.' The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to

be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. *The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest.* No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court. (Emphasis supplied.)

"The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on his *voire dire*; and his evidence, taken as a whole, shows that he 'believed' he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the 'conscience or discretion' of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real

disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed. . . ."

Petitioner in support of his petition has cited Irvin v. Dowd, decided by the United States Supreme Court on June 5, 1961, and reported in 29 LW 4611. In my opinion the facts of the instant case bear no similarity to those in the Irvin case. However, in Irvin the Court citing the Reynolds case, supra, said:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best quali-

fied to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.* Spies v. Illinois, 123 U.S. 131; Holt v. United States, 218 U. S. 245; Reynolds v. United States, supra. (Emphasis supplied.)

* * * * * * *

"Here the 'pattern of deep and bitter prejudice' shown to be present throughout the community, cf. Stroble v. California, 343 U.S. 181, was clearly reflected in the sum total of the voir dire examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. . . . *Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he 'could not . . . give the defendant the benefit of the doubt that he is innocent.' Another stated that he had a 'somewhat' certain fixed opinion as to petitioner's guilt. . . .*" (Emphasis supplied.)

Although petitioner contends the remarks of the Governor had been widely disseminated in Dauphin County by press, television and radio, it is pertinent to note that at no time was the effect of these remarks upon the jury raised with praticularity by the usual methods, such as a motion for change of venue, a challenge to the array, or by individual challenges for cause during selection of the petit jurors on voir dire.

In Stroble v. California, 1952, 343 U.S. 181, 194, speaking for the Court, Justice Clark said:

> ". . . in an effort to determine whether there was public hysteria or widespread community prejudice against petitioner at the time of his trial, we think it significant that two deputy public defenders who were vigorous in petitioner's defense throughout the trial, saw no occasion to seek a transfer of the action to another county on the ground that prejudicial newspaper accounts had made it impossible for petitioner to obtain a fair trial in the Superior Court of Los Angeles County."

It is equally significant in the instant case that with sixteen counsel of record for the defendants none of them thought the matter of sufficient consequence or importance to raise it at the appropriate time. If petitioner deemed the matter of sufficient importance, he could not sit idly by and fail to raise it at the proper time on a gamble on the verdict and then being dissatisfied with the verdict, vociferously assert a deprivation of due process.

A careful reading of the entire transcript covering the voir dire examination of prospective jurors disclosed only a very cursory reference to the Governor's

speech. The examination certainly does not disclose that any juror had formed "strong and deep impressions which close the mind against the testimony that may be offered in opposition to them."[3] The trial court certainly was justified in concluding that all of the jurors selected would lay aside any impression or opinion he may have entertained (and incidentally the record is devoid of any suggestion that any juror had formed any opinion) and render a verdict based on the evidence produced in Court.

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3. As to the total lack of any evidence of the bias or prejudice claimed by the petitioner, the following summary of the attitudes of the twelve jurors selected is pertinent:

Juror No. 1. This juror indicated he could return a verdict based on the evidence and the instructions of the Court and nothing else. Had read "the headline in the paper," that was all he had "seen about the Turnpike case."

Juror No. 2. "Q Does it mean anything to you? Have you read about it or have you heard it discussed in any way at all directly or indirectly? A No. I hadn't. I wasn't even following that. Q Do you know there was such a case? A I heard of a case like that in the paper and so forth. I hadn't read too much because I wasn't interested too much in it. Q You have never discussed it with anyone? A No."

Juror No. 3. "Q Where did you hear about it? A Oh, little dribdrabs here and there, then I read here and there pieces. I don't remember too much about it. . . . Q Did you have occasion, sir, to discuss it with anyone, any of your friends or other people? A No. No. I just passed it by as another thing to read, something in the headlines. . . . I haven't read enough to form an opinion."

Juror No. 4. "Q This is one of the so-called Turnpike cases. Have you discussed this case with anyone? A No, I have not. Q Have you heard it discussed in your presence? A No. I have not. Q Have you formed or

REASON 5 (h)

Petitioner states that "the trial judge failed to strive for an atmosphere of impartiality, but on the contrary gave the appearance of acting, and in fact acted as a member of the prosecution team."

As to this charge the Superior Court (190 Pa. Superior Ct. 179, 267) said:

". . . A reading of the entire record discloses no basic unfairness, bias, or prejudice in the admission or restriction of evidence, the examination and

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expressed any opinion as to the guilt or innocence of the following defendants — A No, I have not. . . . Q Did you engage in the discussion? A No, I didn't know anything about it. Q Have you any opinion at the present time concerning the guilt or innocence — A I have not."

Juror No. 5. "Q Have you formed any opinion as to the guilt or innocence of any of these gentlemen? A No, I have not. Q If you were selected as a juror in this case, do you know of any reason why you could not take your place with the other jurors, listen to the testimony from the witnesses and His Honor's charge, and find a fair verdict between the Commonwealth and these defendants? A No, I don't as any reason why I couldn't. . . . A I have read about it, not too much, and I haven't discussed it with anyone. Q From what you have read, have you formed any opinion as to the guilt or innocence of any of the parties? A Well, not exactly. I was think about it. . . . Q . . . While you say you could put this opinion aside, yet you also agree that it would take some evidence in order to overcome the opinion previously formed, is that correct? A Well, I would have to hear the evidence, yes. Q Would you have to hear some evidence from the defendants to overcome this opinion which you had formed? A From the defendants? No, I don't think so."

Juror No. 6. "A No, I didn't read nothing about it."

cross-examination of witnesses, or the attitude of the court toward defendants. The attitude of the trial judge in his rulings, in permitting the presentation of evidence, in the cross-examination of witnesses, as it can be gathered from the printed record, was equally fair to both sides. We point specifically to the wide latitude permitted defense counsel in cross-examining such witnesses as Lawler and Summers. We note that each of the counsel for the nine defendants on trial were given full and

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Juror No. 7. "Q This is one of the so-called Turnpike cases. Now, I ask you, have you read about this case? A Not too much. Q In the newspaper? A Very little. Q Have you discussed it with anyone? A No sir. Q Have you heard it discussed in your presence? A No. . . . A I knew there was an investigation, that it would be tried, but I had no idea when. Q In what manner did that information come to your attention? A Oh, just possibly by headlines. . . . A Headlines in the paper, that is the only way. . . . Q You have no opinion at the present time? A None at all, because I never read it in detail."

Juror No. 8. "Q . . ., this is one of the so-called Pennsylvania Turnpike cases. A Yes. Q Have you read about it in the newspaper? A Well, very little. Q Have you discussed it with anyone? A No. Q Has it been discussed in your presence? A No. Q Have you formed or expressed any opinion as to the guilt or innocence of any of the following named gentlemen — A I have not, because I don't know that much about it. . . . Q You have, have you not, some knowledge of this case? A Very little. Q What little you have was obtained from what source? A It came from a headline in the paper."

Juror No. 9 "A Have you formed and expressed any opinion in these cases which are known as the Turnpike cases? A No, I didn't. Q Have you heard the cases discussed at all? A No."

separate opportunity to cross-examine witnesses and present evidence. *Defense counsel were also permitted to cross-examine the defendant Torrance and to elicit from him by leading questions much favorable evidence.* Certainly in a trial of this nature and length there may be some errors of minor consequence; we find no reversible error. That the jury reached its conclusion without bias or prejudice from the conduct of the trial is indicated in some degree by the fact that four of the defendants in this joint trial were acquitted. . . . The myriad minor items enumerated in the briefs of defendants in connection with the attack upon the over-all conduct of the proceedings neither singly nor collectively demonstrate any basic unfairness. (Emphasis supplied.)

Juror No. 10. "Q Have you read anything about this in the public press? A No, sir, just headlines that meet the eye, that is all. Q Have you discussed it with anyone; I am speaking now of the case we are talking about? A No. . . . Q I am talking about the radio and television. I asked you whether you heard it discussed on television or on the radio? A No, sir."

Juror No. 11 "Q You have heard of these cases? A Yes, I have heard of them. Q Have you read about them? A Not too much. Q Have you read to some extent about them? A Some extent, but I formed no opinion. . . . Q Whatever information you have about this case was obtained from what source? A The only thing that I know anything at all about is what I have read in the paper. Q In the newspapers? A Yes, and that was very little."

Juror No. 12. "Q . . . , this is one of the so-called Turnpike cases, and I ask you now these questions: Have you discussed them with anybody? A No. Q Have you heard it discussed in your presence? A No, I didn't. Q Have you formed or expressed any opinion as to the

"We conclude this opinion by referring to one other allegation of the defendants to the effect that the trial judge was biased and unfair. This is devoid of merit. As a matter of fact, under the circumstances he displayed unusual self-control and forbearance. There were lengthy and repetitious objections by fourteen defense counsel during the trial, and at its conclusion, in support of their motions, they assigned 941 reasons and 221 additional reasons incorporated by reference. In the record of 6,500 pages we find no justification for the criticism by defendants of the conduct of the trial judge. It is our conclusion that defendants had a fair and impartial trial, and that there was no violation of due process of law."

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guilt or innocence of any of the following gentlemen: . . . — A No. . . . Q Whatever information you may have on this case was acquired from what source, sir? A Well, all the information I have was the little I read in the paper about it. That is about it. I wasn't interested and I didn't read much of it. About the headlines, that was all. Q I take it you have not been asked and you did not discuss it with anyone? A No. . . . Q Do you have a completely unbiased mind regarding this case? A Yes, sir."

The total number of jurors examined was twenty-six and as to those who were excused for cause or on peremptory challenge, the answers were generally similar to those above; the cause for excuse being such matters as deafness, acquaintanceship with some of the parties involved, and the inability to read. Only one juror who was examined and was then excused for cause indicated as follows: "A I read a little in the paper, that's all. Q From what you have read have you formed any opinion — . . . A I have an opinion, yes. . . . Q Would it require evidence to change that opinion? A Yes, sir.

With this appraisal of Judge Kreider's conduct of the trial, I am in complete accord. The complexity of the issues, the number of defendants and their attorneys, and the time consumed, obviously made this a most difficult case to try. I cannot see how it would be humanly possible for any judge under the circumstances of this case to more nearly approximate assuring a fair and impartial trial to all parties concerned, namely, the Commonwealth, nine defendants and the nineteen attorneys. I feel that this reason is completely without merit.

Two oral arguments were heard by this Court on the instant petition. The Court was furnished a complete transcript of the trial of the case, including the examination of the prospective jurors on their voir dire. The transcript covered approximately 7,000 pages. Counsel for petitioner and for the Commonwealth were requested by the Court to indicate such portions of the testimony as they felt had a bearing on this petition, and this was all read. The entire testimony covering the examination of the prospective jurors was read. The opinions of the trial court and all of the appellate opinions were read.

Tnis is a habeas corpus proceeding,—it is not an appeal. Our concern here is whether in his trial resulting in his conviction and the judgment and commitment thereon he was denied the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. My conclusion is that he was not.

The petition for writ of habeas corpus will be denied.
June 30, 1961

/s/ FREDERICK V. FOLLMER
United States District Judge

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, ex rel. JAMES F. TORRANCE v. JOSEPH SALZINGER, Warden of the Dauphin County Prison	278 Miscl. Docket #12 Original Jurisdiction

Opinion of the Court

Filed January 30, 1962.

BELL, C. J.

We took original jurisdiction of this Petition for a Writ of Habeas Corpus under the power conferred upon us by Article V, Section 3, of the Constitution (1) because of the extraordinary circumstances in this case, (2) because of the very serious illness of petitioner, (3) because petitioner concedes there is no new evidence nor any factual issue involved but solely a question of law, and (4) because petitioner had filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania and Torrance's appeal from the Order dismissing his petition will not be considered by the Court of Appeals for the Third Circuit until Torrance, pursuant to 28 U.S.C. §2254, has exhausted his remedies in this Court.

The basis of petitioner's contention is that there was a lack of adequate or sufficient evidence to prove his guilt of the crime of which he was convicted in Dauphin County and hence he was deprived of due process. A

gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people were convicted and duly sentenced. Torrance, who was a member of the Pennsylvania Turnpike Commission at the time this fraud was committed by others, was convicted with three others for conspiracy.

The crime of conspiracy for which these defendants were convicted arose principally out of a contract dated February 28, 1955, between the commission and Manu-Mine. The contract provided for surface support for the right-of-way of the Northeastern Extension of the Turnpike across the anthracite coal regions by the use of slushing material into mine voids underlying the roadway area, which land had been appropriated by the Commission for part of the Northeast Highway.

The basic question involved in the Torrance (and Evans) appeals was thus stated: Was the Commonwealth's evidence legally sufficient to prove beyond a reasonable doubt that each of these particular defendants was guilty of criminal conspiracy to perpetrate this fraud? The Superior Court, in an exhaustive opinion (*Commonwealth v. Evans,* 190 Pa. Superior Ct. 179-269, 154 A. 2d 57 (1959)), discussed the evidence in great detail and held that it was sufficient to prove that Torrance was guilty of conspiracy. Three of the seven members of the Superior Court strongly dissented. An allocatur was allowed to this Court. This Court in a three line Per Curiam Opinion (which represented the views of four members of this Court) affirmed the judgment of

the Superior Court, 399 Pa. 387, 160 A. 2d 407 (April 1960). The present Chief Justice wrote a lengthy dissenting opinion (which was joined in by Mr. Justice JONES), in which he carefully reviewed the evidence and stated his conviction that the evidence was not sufficient to prove that defendant was guilty of the crime charged.*

Petitioner relies upon two decisions of the Supreme Court of the United States which were handed down after this Court's decision in Torrance's first appeal, namely: *Garner v. Louisiana*, 30 U.S.L.W. 4070 (Opinion filed on December 11, 1961) and *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Torrance contends that these decisions demonstrate that he was deprived of due process which is guaranteed by the Fourteenth Amendment. In our judgment neither of these cases is apposite or controlling. Both are concerned with the *complete absence* of any evidence to support a conviction. In the *Thompson* case, supra, the Court said (page 199): "The ultimate question presented to us is whether the charges against petitioner were *so totally devoid*** of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. *Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all.*"

In *Garner v. Louisiana*, supra, the Court said (page 4071): "As in Thompson v. City of Louisville, 362 U.S.

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* The writer of this Opinion is still firmly convinced that the evidence was insufficient to sustain Torrance's conviction.

** Italics throughout ours.

199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace."

Rule discharged and petition dismissed.

Mr. Justice COHEN took no part in the consideration or decision of this case.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH v. THOMAS J. EVANS, JAMES F. TORRANCE, ET AL.	Nos. 36 and 37 March Term, 1959

Opinions of the Superior Court of Pennsylvania

OPINION BY RHODES, P. J., August 10, 1959:

These appeals are by five defendants, Thomas J. Evans, James F. Torrance, Charles W. Stickler, Clayton A. Landsidle, and Paul J. McNeill from judgments of sentence of the Court of Quarter Sessions of Dauphin County. Defendants were convicted of conspiracy to cheat and defraud the Pennsylvania Turnpike Commission in connection with certain transactions involving the Manu-Mine Research and Development Company during construction of the Northeastern Extension of the Pennsylvania Turnpike.[1] In addition, Thomas J. Evans, the former chairman of the commission, and James F. Torrance, a former member and secretary-treasurer of the commission, were convicted on separate indictments charging misbehavior in office. Charles W. Stickler, president of Manu-Mine and a principal stockholder, and Clayton A. Landsidle, general manager of Manu-Mine, were also convicted on an indictment charging the crime of cheating by fraudulent pretense, the Pennsylvania Turnpike Commission having been alleg-

1. Four other defendants who were likewise indicted in the Court of Quarter Sessions of Dauphin County for conspiracy to cheat and defraud the Pennsylvania Turnpike Commission were acquitted.

The ostensible purpose of the contract was to provide surface support for the right of way of the Northeastern Extension across the anthracite coal measures by means of a program of slushing material into mine voids underlying the road way area. Under the contract, Manu-Mine was engaged (1) to plan and design the slushing operation, for which it was to be paid a maximum of $9,600; (2) to supervise and inspect the slushing work, for which it was to be paid either $138 or $207 per eight-hour shift, depending upon underground conditions; and (3) to drill and case holes through which the material was to be slushed underground, for which it was to be paid $12.50 per foot of hole drilled. Manu-Mine performed work under the contract until it was suspended on February 7, 1956, prior to full completion. No voucher for the $9,600 for design work was submitted during the active performance of the contract. But for work up to December 31, 1955, payments had been made to Manu-Mine totaling $6,846,441.64, of which $6,724,718.74 was for drilling, and $121,722.90 was for inspection and supervision. Periodical estimates for additional work to February 29, 1956, were submitted in the amount of approximately $833,000, but they were not paid. Of the total amount of $7,679,441.64 "earned" by Manu-Mine under the contract, the profit, after all expenses, amounted to approximately $4,000,000, or more than 100 per cent of the cost. Manu-Mine was owned by defendant Stickler, Stickler's wife, and the late Richard Evans. Stickler was a nephew of the wife of defendant Evans, and Richard Evans was his son.

In brief, it was the theory of the Commonwealth that the defendants had conspired to defraud the commission by obtaining this contract and payments there-

under for Manu-Mine; that the drilling and slushing program, inaugurated at the request and on the recommendation of Manu-Mine, was in fact 95 per cent unnecessary; and that the price for drilling was unconscionably excessive and fraudulent, especially since Manu-Mine had represented that the contract cost per foot of drilling had been computed on the basis of the cost plus only 10 per cent profit.

I. The Validity of the Indictments

On October 22, 1956, upon the petition of the Attorney General of the Commonwealth, dated September 1, 1956, in which the District Attorney of Dauphin County had joined, a special investigating grand jury was convened. The matters disclosed by the presentment of the investigating grand jury formed the basis for the bills of indictment submitted, at the direction of the court, to the regular grand jury for the January Sessions of 1957. On January 23, 1957, the regular grand jury returned indictments against the nine defendants, five of whom have appealed after conviction, and four of whom were acquitted. Defendants moved to quash the indictments, alleging that on the evening that the investigating grand jury convened and on the following evening the Governor of the Commonwealth, in broadcasts over two Harrisburg television stations, made an inflammatory speech and remarks, and that the district attorney and the special deputy attorney general had intruded upon the deliberations of the investigating grand jury, which was prejudicial to defendants. The motions to quash were denied in an opinion by Judge NEELY; we believe this was proper.

It is significant that the motions to quash, with the exception of that filed by defendant Torrance, do not question the form or sufficiency of the indictments, and that the matters alleged as prejudicial, are extraneous to the indictments and relate principally to the investigating grand jury and not to the indicting grand jury. Ordinarily, alleged defects or irregularities in the proceedings preliminary or antecedent to the indictment may not be considered on a motion to quash. *Com. v. Gross,* 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251. A motion to quash which is based upon the allegation of extraneous factors should not be sustained unless it clearly appears that the defendant has been harmed by some improper conduct that interfered with his substantial rights. The court below concluded that the remarks of the Governor at the time the investigating grand jury convened were not such as to harm the defendants in the subsequent return of the indictments. In this respect the court considered not only the allegations of defendants, but also the fact that the investigating grand jury was specifically admonished in the charge of the court to divorce its deliberations from any political turmoil, public clamor, or publicity, and to reach its conclusions on the basis of the evidence presented "uninfluenced by any partisanship or political considerations whatsoever." There is nothing to indicate that the investigating grand jury did not properly follow this instruction. *Com. v. Brownmiller,* 141 Pa. Superior Ct. 107, 113, 14 A. 2d 907. Nor is there any indication that the grand jurors heard such irrelevant remarks. If they had it would not necessarily invalidate the subsequent indictments based upon other

and proper evidence. *Com. v. Gross*, supra, 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251.

The allegation of intrusion by the district attorney and the special deputy attorney general is likewise extraneous to the indictments and is without merit.

"It is the duty of the district attorney . . . to attend upon a grand jury, lay before them all matters upon which they are to pass, aid them in the examination of witnesses and give general instructions as may be required. It is highly improper, however, for the district attorney . . . to take part in the deliberations of a grand jury, as it is their duty to consider alone the evidence and apply it to the case." *Com. v. Brownmiller*, supra, 141 Pa. Superior Ct. 107, 113, 14 A. 2d 907, 910. The record shows that the district attorney and the deputy attorney general properly attended upon the investigating grand jury giving only general advice. There was no improper conduct or intrusion upon its deliberations.

A further consideration is that the investigating grand jury and the indicting grand jury are separate legal bodies. Although both may have considered the same alleged crimes involving the same individuals, their proceedings, deliberations, and presentments are distinct. Extraneous matters affecting one may not influence the other, and irregularities before one are not always present in the other; the two bodies are unrelated in this respect. Consequently, an indictment by a regular grand jury is not necessarily tainted by some irregularity or improper influence alleged to have affected the investigating grand jury. *Com. v. Gross*, supra, 172 Pa. Superior Ct. 85, 90, 91, 92 A. 2d 251. At least,

the irregularity or improper influence must be shown to have also affected the indicting grand jury. Nothing of this nature appears in this case. "No matter how irregular the investigatory proceedings before the grand jury may have been, the presentment at least furnished the district attorney with information sufficient to justify his application for leave to present a district attorney's bill." *Com. v. Brownmiller,* 137 Pa. Superior Ct. 261, 267, 9 A. 2d 155, 158.

In his appeal Torrance raises two additional matters with respect to the indictments, one possibly affecting their form and the other attacking their sufficiency. It is argued that the court failed to approve the indictments pesented to the regular grand jury. On January 21, 1957, the court entered an order that the district attorney "prepare and submit to the regular January, 1957, Grand Jury now in sessions, bills of indictment covering all the matters contained in the Presentment of the Special Grand Jury of Investigation made to the Court on Friday, January 18, 1957." Apparently no subsequent order formally approving the indictments drawn pursuant to this order was entered.

Generally, an indictment may come before a grand jury only if it is founded upon the transcript of a magistrate or an order of court evidencing leave to present it. *Com. v. Wilson,* 134 Pa. Superior Ct. 222, 227, 4 A. 2d 324; *Com. v. Russo,* 177 Pa. Superior Ct. 470, 477, 111 A. 2d 359. A district attorney's bill would appear to be a substitute for the preliminary proceedings normally held in criminal matters. As such it should be subject to the general rule previously stated that alleged defects or irregularities in the proceedings preliminary or ante-

cedent to indictment may not be examined on a motion to quash. *Com. v. Gross*, supra, 172 Pa. Superior Ct. 85, 92, 92 A. 2d 251. Nevertheless, we are of the opinion that the order of January 21, 1957, was sufficient leave of court for submission of the indictments. The order directed not only the preparation of indictments covering the matters presented by the investigating grand jury, but the submission of those indictments to the regular grand jury as well. In both respects the district attorney acted in conformity with the court's order.

It has also been argued before us on behalf of Torrance that the indictments are insufficient as a matter of law. At No. 216, January Sessions, 1957, Torrance and the other defendants were indicted for conspiracy to defraud and to do other unlawful acts to the prejudice of the commission in connection with the Manu-Mine contract of February 28, 1955. At No. 220, January Sessions, 1957, Torrance was indicted on three counts—the first charging misbehavior in office by corruptly participating in the negotiation and obtaining of the Manu-Mine contract; the second charging misbehavior in office by willfully and corruptly permitting the Manu-Mine contract to become effective thereafter and by permitting payment of vast sums of money to Manu-Mine pursuant to said contract; and the third charging that he, being a turnpike commissioner, hampered, obstructed, and corruptly interfered with the proper investigation of the Manu-Mine contract. Torrance claims that the conspiracy indictment and counts 1 and 2 of the misbehavior indictment contain erroneous statements of the law relative to contracts entered into by the commission in that the practice of competitive bidding, the requirement of performance bonds, and similar contractual provisions

are referred to as "legal" requirements which were not complied with in the negotiation and execution of the Manu-Mine contract. We have examined the indictments thoroughly and conclude that, even assuming that the practice of competitive bidding and the inclusion of the customary provisions of a construction contract are not legal requirements, the indictments are nevertheless sufficient. The statements in the indictments to the effect that these requirements are "legal" requirements, if erroneous, would be surplusage; the validity of the indictments is not affected by the elimination of the words "legal" or "legally." *Com. v. Bristow*, 185 Pa. Superior Ct. 448, 459, 138 A. 2d 156; *Com. v. Havrilla*, 38 Pa. Superior Ct. 292, 297. Eliminating the words "legal" or "legally," the indictments still charge that, in negotiating and obtaining the Manu-Mine contract, the defendants did not comply with the usual practice of the commission regarding competitive bidding or include other contractual provisions normal to construction contracts, and that the failure to follow these normal procedures was one of the methods by which the fraud was perpetrated, the contract obtained, and the moneys paid, to the prejudice of the commission. Whether or not these procedures are legal requirements, and the significance of the failure of defendants to comply therewith will be the subject of further discussion in this opinion.

The motions to quash the indictments were properly denied.

II. The Sufficiency of the Evidence

Probably the most important issue before us is the sufficiency of the evidence to support the jury's verdicts that the defendants were guilty of the crimes charged in the indictments.

We turn to a consideration of the motions in arrest of judgment and the sufficiency of the evidence to sustain the convictions. The evidence was largely circumstantial especially as it related to the conspiracy. The burden was upon the Commonwealth to overcome the presumption of innocence and to establish beyond a reasonable doubt the crimes charged. That the evidence was wholly or largely circumstantial is not fatal if it appears that the evidence is such as reasonably and naturally justifies an inference of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. *Com. v. Bausewine,* 354 Pa. 35, 40, 46 A. 2d 491; *Com. v. Nasuti,* 385 Pa. 436, 445, 123 A. 2d 435; *Com. v. Clinton,* 391 Pa. 212, 218, 137 A. 2d 463; *Com. v. Ott,* 154 Pa. Superior Ct. 647, 652, 36 A. 2d 838. A conviction will not be allowed to stand if it is based solely upon suspicions and conjectures. *Com. v. Clinton,* supra, 391 Pa. 212, 218, 137 A. 2d 463. "Where conviction must be based on circumstantial evidence, as it must here, the theme of guilt must flow from the facts and circumstances proved, and be consistent with them all." *Com. v. Clinton,* supra, 391 Pa. 212, 218, 137 A. 2d 463, 466. The Commonwealth, however, is "'. . . not required to present direct and positive testimony of a collusive agreement to do something unlawful. The nature of the crime attempted usually makes it susceptible of no other proof than by circumstantial evidence . . .'" *Com. v. Musser Forests, Inc.,* 394 Pa. 205, 211, 146 A. 2d 714, 717.

In a conspiracy trial, where fraud is involved, there is a wide latitude allowed in the introduction of evidence.

Consideration should be given to the background of the arrangements made by defendants and their methods of association where a criminal scheme has numerous actors and shifting scenes of action the conspiracy is often made out by the association of detached facts and by the reasonable inferences deducible therefrom. Evidence of the acts and circumstances in fulfillment of the object of the conspiracy is relevant. *Com. v. Berman*, 119 Pa. Superior Ct. 315, 326, 181 A. 244; *Com. v. Sanderson*, 40 Pa. Superior Ct. 416, 472, 473; *Com. v. Bartell*, 184 Pa. Superior Ct. 528, 548, 136 A. 2d 166; *Walter J. Scanlon & Son v. Sherbine*, 382 Pa. 376, 379, 114 A. 2d 900. Moreover, "the actions of the conpirators will be sufficient evidence to prove that a conspiracy exists." *Com. v. Musser Forests, Inc.*, supra, 394 Pa. 205, 210, 146 A. 2d 714, 716.

With these principles in mind we shall consider the evidence. The Manu-Mine Research and Development Company was incorporated in March, 1951. The incorporators included Stickler, Richard Evans, and several other individuals. In its first year of business Manu-Mine sold paint and preservatives and suffered a loss in all its operations of approximately $300. During this year it had received nominal orders for paints or sealing compounds from the commission. From this time on Manu-Mine experienced progressively greater financial success almost exclusively as a result of business with the commission.[3] By October 31, 1953, Manu-Mine had

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3. In 1952, Manu-Mine did a total business of $116,000 of which $112,000 was for soil solidification work done on tunnels of the original turnpike. The commission provided approximately 95 per cent of Manu-Mine's business for that year. The soil solidification

a total gross business since its inception of $460,000 of which $426,000 was received from the commission. By this date only Stickler and Richard Evans of the original incorporators remained. The favorable relationship between Manu-Mine and the commission become evident about this time. Jerome LaManna who was the accountant for Manu-Mine inquired of Stickler how Manu-Mine obtained work from the commission without bids, and Stickler informed him that the business was not contract work but a purchase order. It is noted in this regard that Richard Evans, vice president and stockholder of Manu-Mine, had no desk at its office and apparently participated in the running of the business only to the extent of attending board meetings and advising Stickler on insurance matters. Nevertheless, he received a salary and bonus commensurate with full time executive employment.

In the year 1954 total sales of Manu-Mine were $815,000 of which $757,000 or 90 per cent was received from the Turnpike Commission. The stockholders at this time, and thereafter, were Stickler, who owned over 50 per cent, Mrs. Stickler, and Richard Evans. For the year 1955 the total amount of business transacted by Manu-Mine was $5,200,000 of which $4,800,000 or 90 per cent was received from the commission. By October 31, 1955, the stock of Manu-Mine, which had a value of

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work was actually performed by a sub-contractor. The Chemical Soil and Solidification Company of Chicago, at a total cost of about $62,000. Manu-Mine had a gross profit on this job of $50,000. In the following year, 1953, Manu-Mine did a total business of $310,000, 31 per cent of which represented income from the Turnpike Commission for soil solidification work, for a survey, and for sales of materials.

$100 in 1951, had a value of $42,600 per share. For the year 1956, the year in which Manu-Mine was suspended from the February 28th contract Manu-Mine did a total business of $4,500,000 of which $2,800,000 or 63 per cent came from the commission.

In October, 1953, the commission gave a contract to Manu-Mine to study the mining conditions underlying each of four proposed alternate right of way lines for construction of the Northeastern Extension as it crossed the anthracite coal measures and to make recommendations as to the best line to follow. In February, 1954, the commission employed Manu-Mine to furnish an estimate of the value of coal under the proposed route of the Northeastern Extension. On July 7, 1954, the commission entered into a contract with Manu-Mine to patrol the line of the proposed turnpike in the anthracite area and to obtain and furnish aerial photographs of the right of way. On the same date the commission engaged Manu-Mine to do exploratory drilling, research, and engineering work in the anthracite area for the purpose of ascertaining the underground conditions and recommending corrective action.[4]

While the engineering services and work under the contract of July 7, 1954, were being performed by Manu-

4. This contract was to run for a period of three months for which Manu-Mine was to be paid $19,250 per month plus an amount for drilling exploratory boreholes which was to be later agreed upon. The contract was extended twice for periods of three months on each occasion; a third extension was granted April 7, 1955, for a period of six months at a reduced fee of $16,500 per month. Altogether Manu-Mine was paid $272,000 for the engineering and $104,000 for the drilling or a total of $376,000 under this contract of July 7, 1954.

Mine, the contract which formed the essential basis for these indictments came into being. On February 28, 1955, a contract was given to Manu-Mine without competitive bidding to lay out and design a slushing program to provide surface support for the turnpike as it crossed the anthracite measures, to drill holes into the underground voids at a price of $12.50 per foot through which material was to be slushed underground, and to supervise the operations of the contractors who were engaged by the commission to supply the material and slush it into the underground voids through the holes drilled by Manu-Mine. The negotiation of this contract had its inception at the instance of Manu-Mine. It appears that in December, 1954, Stickler, Landsidle, and Harry Luke, project engineer of Manu-Mine, gave consideration to proposing to the commission that Manu-Mine do the drilling for the slushing program. Stickler and Landsidle decided they could do the drilling work, and they prepared a draft of the contract to submit to the commission. Landsidle and Luke met with John D. Paul, assistant chief engineer of the commission, on December 30, 1954, at which time they discussed the proposed contract and Paul requested that estimates of the cost of the work be furnished. Early in January, 1955, a meeting was held at the Hotel Sterling, in Wilkes-Barre, attended by Evans, Torrance, Stickler, John D. Paul, and others for the purpose of examining the right of way line of the turnpike and to make some determination with respect to crossing the coal measures. Arthur B. Cleaves, a geologist who was at that time employed by the commission on a part time basis and also by Manu-Mine, testified that at this meeting Evans berated him because a local newspaper had carried a story to the effect that Manu-

Mine was going to receive a contract from the commission in connection with the slushing program. The commission, and in particular Evans, was upset by the premature publicity; Evans told Cleaves, "What is the matter with you? I thought you were supposed to see that Manu-Mine didn't get into any problems like this." This unwanted publicity resulted when Luke told a newspaper reporter about January 4, 1955, that Manu-Mine would receive a contract from the commission for this slushing program. Luke furnished the newspaper with certain details of the transaction, such as the fact that the work had to be completed by 1956.

On January 6, 1955, Landsidle submitted to the commission a draft of the contract for services and work in the slushing program, a cost analysis of the various items under the contract, including the $12.50 per foot drilling price, and estimates of the cost of drilling and slushing across the anthracite measures. On January 13, 1955, Landsidle and Luke met with John D. Paul and discussed the time necessary to complete the slushing program. Paul informed them that their proposed drilling program would take two years and that this was unsatisfactory since construction had to be completed by February, 1956. Landsidle knew then that the proposed drilling program was inadequate.

Thereafter, on February 14, 1955, Manu-Mine submitted supplements to the initial draft of the contract.

The preliminary copy of the contract submitted by Manu-Mine was drafted into final form at the commission, with certain minor changes and the supplements, and was approved by the commission at its meeting on February 28, 1955. After its approval the contract

was executed by Evans, Torrance, Theodore S. Paul, the commission counsel, Stickler and Landsidle.

The circumstances of the adoption of the Manu-Mine contract at the February 28, 1955, meeting of the Turnpike Commission were testified to by Joseph J. Lawler, the then recently appointed Secretary of Highways and ex officio member of the commission. This was apparently the second meeting of the commission that Lawler attended. Prior to the meeting on February 28th, Lawler had not heard of Manu-Mine, did not have knowledge of the work to be performed under this contract, and did not know who the officials of Manu-Mine were or their relationship with Evans. The general provisions of the contract, which was designated as a contract for engineering services, were outlined at the meeting by John D. Paul. In the course of the discussion it was stressed to Lawler that it was important that the contract be approved expeditiously to meet the completion of construction of the Northeastern Extension because of the interest payments to be made on the bonds which had been sold for its construction. Evans and Torrance indicated that it was in the best interest of the commission that the contract be approved and pointed out to Lawler that Manu-Mine had an international reputation, that it was an outstanding firm, and that it was the only firm in existence that was qualified to do that type of work. Lawler stated that he did not question the contract because he respected the other members of the commission since they had experience at the commission and had previously done business with Manu-Mine. The contract was approved by the vote of all of the commissioners, that is, Evans, Torrance, McSorley, Watson, and Lawler.

Subsequently, Manu-Mine began work under the contract, and in May, 1955, submitted its first periodical estimate for payment. It continued to perform work until its suspension, after an investigation, on February 27, 1956. For the work performed Manu-Mine submitted periodical estimates for payment in the total amount of $7,679,441.64, of which $6,846,441.64 was paid. Of the amount paid $6,724,718.74 was for drilling at $12.50 per foot.

Under the Act of 1937 which created the Pennsylvania Turnpike Commission and made it an instrumentality of the Commonwealth, and the Act of 1951 which authorized the Northeastern Extension to the Pennsylvania Turnpike, the commission is given the power to contract, provided, however, that contracts relating to construction are required to be approved by the Department of Highways and such construction must be performed under the supervision of that department.[5] For the purpose of scrutinizing construction contracts which required approval of the Department of Highways and for the giving of such approval the Department of Highways maintained at the commission a liaison officer. The department kept a file in its own office of commission contracts which it approved. Before giving his approval, the Department of Highways' liaison officer would check the contracts, the quantities, unit prices and similar matters. If the contracts were found to be satisfactory it was his practice as a rule to approve for the Department of Highways the construction contracts entered into by the commission. The

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5. Section 4, Act of May 21, 1937, P. L. 211, 36 PS § 652d; section 6 of the Act of September 27, 1951, P. L. 1430, 36 PS § 660.6.

liaison officer, Henry Kloss, a registered professional engineer, in March or April, 1955, inspected the drilling being done by Manu-Mine on the Northeastern Extension. When he learned that the drilling was not exploratory drilling, that is test drilling, but was drilling for purposes of slushing or flushing, he questioned John D. Paul, the commission engineer, concerning the contract under which the drilling was done. He was informed by Paul that the contract was not necessarily construction but that it was part of an engineering proposition. The Manu-Mine contract was never submitted to Kloss for approval; it was not approved by the Department of Highways and was not on file at the department.

The commission as a general rule uses a standard form of construction contract. The Manu-Mine contract however, was in the special form of engineering contracts. Engineering contracts as distinguished from construction contracts are not required by law to have the approval of the Department of Highways.

The use of an engineering form for this contract is significant in other respects. It was the general procedure at the commission, notwithstanding the fact that there is no such legal requirement in the statute, that contracts for construction, as distinguished from engineering contracts, be let after bids are obtained. The general practice was that specifications would first be drawn up and advertisements for bids be placed. The contract was then awarded to the properly qualified low bidder. This practice was varied in some instances in that some construction contracts as well as engineering and other contracts were negotiated. It is significant that the Manu-Mine contract negotiations were insti-

tuted by Manu-Mine without prior specifications having been prepared by the commission.

It was also the practice at the commission that the contractor be required to provide a performance bond and a labor and materialmen's bond, and that the contract contain a provision for the retention of 10 per cent of the periodical payments made during the course of the performance of the contract in order to assure the commission that the work would ultimately be performed and the materials supplied. None of these requirements or provisions were contained in the Manu-Mine contract. Of the forty-one roadway and tunnel construction contracts let on the Northeastern Extension, exclusive of the Manu-Mine contract, all but one were competitively bid, were drawn to the standard form of construction contracts used at the commission, and had the usual protective provisions. Contracts for the construction of the interchange buildings, for some of the bridges, for roadway lighting, and for maintenance buildings were submitted for bids. Contracts for the supplying of materials were generally not bid because they did not relate to roadway construction as such. And many of the contracts relating to the supplying of equipment and materials that were not competitively bid nevertheless contained the protective requirements of a performance bond, a labor and materialmen's bond, and a retention clause. It is clear beyond reasonable doubt that the Manu-Mine contract was disguised as an engineering contract to avoid competitive bidding and the scrutiny of the Department of Highways which would have been required in the normal course of events had it been designated and treated as the construction contract that it was. That it was in reality a construc-

tion contract except for some minor detail is clear from the evidence. The Commonwealth called a number of expert witnesses of considerable experience in mining and construction engineering in general who testified that the drilling of holes for slushing, constituting the major portion of this contract and for which all but a small amount of the funds paid to Manu-Mine was attributable, was construction work.[6] The subsequent handling of the Manu-Mine contract by defendants and the commission corroborated the Commonwealth witnesses. Although the contract had been treated as one relating to engineering services in the negotiations and at its adoption by the commission, it was considered construction in its performance and in the payments made to Manu-Mine for the work done thereunder. The amounts paid to Manu-Mine were drawn from the construction fund, not from the engineering fund. The periodical estimates for payment submitted by Manu-Mine were submitted on the regular contract form of the commission for construction work and Manu-Mine was referred to therein as the "contractor." The certificate on each of the periodical estimates signed by Landsidle

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6. The experts so testifying were: Daniel H. Connelly, Deputy Secretary of Mines and Mineral Industries, who made a study of the turnpike as it crossed the anthracite measures; Thomas M. Beany, a state mine inspector of twelve years' experience, and thirty-nine years' continuous employment in the anthracite field; Ralph Lambert, chief mining engineer for the Department of Mines and Mineral Industries, a registered mining engineer, who participated in the study made by Connelly and Beany; James H. Pierce, a mining engineer with considerable experience in mining, construction, and consulting engineering, who was engaged to investigate the Manu-Mine work.

as general manager of Manu-Mine states that the work has been performed in accordance with the "terms and conditions of the corresponding construction contract documents." The contract later received a number in the sequence of construction contracts, and the standard construction performance bond and a labor and materialmen's bond were requested and related back to the time of the contract.

This initial disguise was employed to perpetrate and conceal the fraud of obvious magnitude. When the Northeastern Extension to the Pennsylvania Turnpike was authorized by the Legislature it became necessary that an engineering report be prepared with estimates of the probable cost of construction in order that bonds could be sold to raise funds for construction. The J. E. Greiner Company, the consulting engineer to the commission, prepared a report which it submitted to the commission with a covering letter of March 22, 1954. The total initial construction cost of the Northeastern Extension estimated in the budget was $149,000,000, to which was added a contingency fund in the amount of $19,000,000. The preliminary budget for construction of the Northeastern Extension had nothing by way of allocation of funds for drilling and slushing work. The Greiner report stated only that the anthracite measures required some special consideration since the sub-surface conditions were indeterminate and there remained a propensity for future subsidence. The covering letter, however, stated that the problems that might be encountered in the anthracite measures would require some special investigation and study but that they were not expected to exceed those comparable in character and magnitude heretofore successfully solved on existing

portions of the turnpike. The cost of slushing mined areas was recognized only to the extent that it was a possible contingency, but there was no estimate of that cost provided. It also appears that in addition to the $19,000,000 contingency fund there was, by October, 1954, an indicated surplus in construction costs of $13,000,000 due to the fact that certain types of excavation contracts were actually bid at a lower figure than was originally estimated.

The estimate of the total cost of the drilling and slushing submitted by Manu-Mine with its January 6, 1955, letter indicated a total cost of the program of approximately $4,120,000 of which approximately $3,380,000 was for drilling at the rate of $12.50 per foot. When Manu-Mine submitted its first periodical estimate for payment the cost of drilling on two sections was estimated at $2,500,000. Thereafter the total cost of drilling appearing on the periodical estimates increased first to $6,600,000 and then by December, 1955, to $8,600,000. The total cost of drilling and slushing would have been over $13,500,000.

The cost per mile proposed and charged by Manu-Mine for support of the turnpike in this area was $3,000,000 as compared to a cost per mile of approximately $1,000,000 for the actual roadway.

The fraud perpetrated by this slushing program was twofold. The slushing program was unnecessary to the extent of about 95 per cent and the price charged by Manu-Mine for drilling was grossly exorbitant. The expert witnesses called by the Commonwealth, who had considerable experience in mining and engineering in the anthracite area, testified that slushing is necessary

to render surface support in a first mined area, that is, where pillars of coal are left by the mining operation. But in robbed out areas, that is, where the pillars are removed, the roof of the mine and the surface above it collapses, subsides, and reaches an equilibrium in approximately seven years when the ground comes to rest. The experts stated that the drilling of boreholes and slushing of silt into such areas would not give any additional support to the surface. They testified that the program of Manu-Mine calling for slushing and drilling of boreholes in those areas which had been subjected to second mining, which involved most of the anthracite measures included in the Manu-Mine program, was unnecessary.[7] Manu-Mine used a system of controlled slushing in places where the underground voids were accessible, but the largest amount of drilling was done

7. Daniel H. Connelly testified that seven or eight years after the mining of pillars takes place the possibility of subsidence is 99 per cent removed so that slushing into those voids would not lend any additional support to the surface. Thomas M. Beany, a state mine inspector, testified that all of the work done by Manu-Mine over robbed out areas was unnecessary because the voids had caved in and the overburden had come to rest. Ralph Lambert, chief mining engineer for the Department of Mines and Mineral Industries and a registered mining engineer in the anthracite fields, testified that where pillars were removed the strata had become stabilized and did not require drilling or flushing. Lambert testified that about 95 per cent of the holes drilled by Manu-Mine on two of the sections were not necessary. Franz Kudlich, a professional mining engineer, testified that in the robbed out areas or exhausted areas of coal mining there was either no possibility or a negligible possibility of further subsidence. Kudlich testified that only about 5 per cent of the drilling done by Manu-Mine was necessary.

in areas which were not accessible; in such areas generally Manu-Mine drilled holes on a geometric pattern of five holes abreast every fifty feet along the turnpike right of way.[8] The drilling of holes in a geometric pattern resulted in most of the holes being driven into pillars of coal or otherwise not reaching voids. George D. Oswald, who was employed by the Sullivan Trail Coal Company and Rogers Construction Company in performing the actual slushing into the voids, testified that the holes drilled by Manu-Mine were collapsed or filled with dirt and rock and unable to take more than a token amount of slushing material. He estimated that approximately 60 per cent of the holes would not take the material or more than a negligible amount while the remaining 40 per cent took considerably less than the estimated amount because the holes were collapsed or blocked. Although the purported purpose of the contract was to drill holes into the voids which were to be filled with silt and thus prevent subsidence, the majority of the holes were useless, except to form the basis for the periodical estimates submitted by Manu-Mine. Even the witness Cleaves, who was called by defendants, testified that the drilling of holes for blind flushing in a geometric pattern on 50-foot centers was absurd. That the drilling and slushing program was unnecessary to the extent that it was performed by Manu-Mine, or even a substantial portion thereof, was clearly demonstrated beyond reasonable doubt.

It thus appears that the drilling and slushing program was unnecessary to the extent of about 95 per cent

8. About 90 per cent of the underground area was inaccessible. Approximately 80 per cent of the drilling done by Manu-Mine was this blind drilling.

of that performed by Manu-Mine, while the price charged for drilling was grossly exorbitant.

The draft of the contract sent by Manu-Mine to the commission proposed a price per foot of drilling of $12.50. In justification thereof Manu-Mine submitted a cost analysis showing that at a rate of drilling of 28 feet per day the price represented the cost for each foot drilled plus a profit of 10 per cent. The price charged was directly related to the number of feet that could be drilled in each shift by the drill, which was then designated as a Joy No. 32 air blast drill. Actually, in the major performance of this contract, Manu-Mine used a much heavier drill, a B 58 drill, which was common to the anthracite area, and which experienced a production rate averaging 179 feet per shift. Some apparently went as high as 448 feet per shift. Since the price had been fixed on the basis of 28 feet per shift per drill, the effect of increasing the production to an average of 179 feet per shift was to tremendously increase the income without a proportionate increase in expenses, leaving a profit far in excess of the 10 per cent submitted in the cost analysis. Under the cost analysis the profit per shift would have been about $32, whereas under the actual performance the profit reached $1,400. The Commonwealth's expert witnesses testified that the cost per foot of drilling should have been between $4.50 per foot and $5.95 per foot.[9] The Commonwealth's witnesses were corroborated

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9. Daniel H. Connelly testified that the price per foot of drilling should have been $4.50; Franz Kudlich and James H. Pierce testified that the price should have been $5.95. The actual cost, including substantial bonuses and overhead, experienced by Manu-Mine on the job, plus a 10 per cent profit, amounted to $6.67 per foot.

by the fact that on March 21, 1955, less than a month after the contract with the commission, Manu-Mine bid $3.19 per foot on a drilling job in Carbondale for holes identical in size, to similar depths through the same type earth strata, through the same type of broken ground, and through multiple seams of coal. Manu-Mine lost the job because its bid was too high. The exorbitance of the price paid to Manu-Mine by the commission is clear beyond question. When the cost analysis was submitted, Stickler and Landsidle did not intend to use the Joy No. 32 drill, upon which they based the cost analysis, in the performance of this contract.[10] Landsidle testified that the entire drilling arrangement using the heavier B 58 drills was planned and known to Manu-Mine before the signing of the February 28, 1955, contract. Still the $12.50 price based on the false cost analysis was incorporated into the final contract and was the price paid for the drilling billed.

We are of the opinion that the evidence clearly and beyond a reasonable doubt demonstrates the conspiracy to defraud. The lack of direct evidence of any conspiratorial meeting and agreement between the defendants to perpetrate this fraud has been more than adequately re-

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10. Landsidle testified that on January 6, 1955, when the cost analysis based on the Joy No. 32 drill was sent to the commission, Manu-Mine did not intend to perform the work with that drill. At a meeting on January 13, 1955, with John D. Paul, Landsidle was told that the proposed rate of drilling was unsatisfactory and would take, according to Paul's calculations, two years. Landsidle also stated that he knew that at the 28-foot per shift rate estimated in the cost analysis submitted on January 6, 1955, the job would have taken 20 years with one Joy No. 32 drill.

placed by the wealth of circumstantial evidence which is of such volume and quality as to reasonably and naturally justify the inference of their guilt and to overcome the presumption of innocence. Except in two instances the evidence establishes their guilt on all charges.

While there is no direct evidence of an explicit or formal agreement to commit the fraud, such evidence is not essential, for proof of this criminal partnership is the obvious conclusion arising from the circumstances attending the activities of the defendants. *Com. v. Musser Forests, Inc.,* supra, 394 Pa. 205, 146 A. 2d 714. Viewed in its entirety the record demonstrates the subtle but effective manner in which Manu-Mine came to profit to such an extent by its favorable position with the commission. From its humble beginnings Manu-Mine rose with meteoric speed to a position of great financial success almost exclusively through the co-operative attitude of the commission.

In the initial stages of planning for the construction of the Northeastern Extension the problem of subsidence was not expected to be one of significant magnitude. But when Manu-Mine had entered the scene and began its initial exploratory work the problem of subsidence and what to do about it began to become a major problem. Without prior specifications drawn by the commission or its staff, Manu-Mine proposed the program which ultimately worked to its great profit. Its proposal and the contract it obtained as a result thereof were cleverly disguised as a rather innocuous appearing engineering contract, when in reality the essence of the contract was construction work. So certain was the fact that Manu-Mine would obtain this contract that it indulged itself

an anticipatory announcement in the newspaper article released prematurely by Luke, which so dismayed Evans. The contract was then expeditiously run through the formality of the February 28, 1955, meeting with the aid of Evans and Torrance accompanied by their assurances that the work was necessary and that Manu-Mine was the only firm to do it. Manu-Mine then began work under the contract. It used equipment which had a drilling rate far in excess of the 28 feet per day upon which its drilling price of $12.50 per foot was based. Even the Joy No. 32 drill mentioned in the cost analysis produced an average of 51 feet and a maximum of 78 feet per shift. Manu-Mine drilled holes which served no useful purpose other than to form the basis for periodical estimates for payment. The vast majority of the holes drilled were unnecessary, would not take material, and were of no benefit in the slushing program. For these as well as the few holes that had usefulness it charged the exorbitant price which had fraudulently been obtained and justified by the false cost analysis.

Evans, who had been a commissioner since May 17, 1939, is inextricably a principal in the conspiracy. The substantial success of Manu-Mine, which was owned largely by his son and the nephew of his wife, resulted solely from business given to it by the commission without competitive bidding. His introduction of the commission geologist Cleaves to Stickler, his permitting Cleaves to be employed by both the commission and Manu-Mine, his berating of Cleaves, and his evident disturbance because of the premature publicity given the Manu-Mine contract, his conduct at the February 28, 1955, meeting where together with Torrance he impressed upon Lawler the urgency of letting this contract

to Manu-Mine (the company of reputed international fame), all taken together with the circumstances of the disguise of this contract, the actual futility of the program, and the exorbitant price charged, more than adequately establish his guilt.

Torrance, who had been a commissioner since September 2, 1943, is likewise shown to have been one of the participants in the conspiracy. Torrance attended the January, 1955, meeting at the Hotel Sterling in Wilkes-Barre. Torrance together with Evans urged at the February 28th meeting the adoption of the Manu-Mine contract and recommended the Manu-Mine company as one of international repute. Torrance accepted a gift certificate from Manu-Mine at Christmas, 1954, and earlier had permitted Manu-Mine to improve a trench silo on his farm without cost to him. Torrance admitted that he knew that Stickler was the nephew of the wife of Evans, but denied knowing that Richard Evans was connected with Manu-Mine.[11] Considering the many years of experience that Torrance had at the commission and his

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11. Torrance testified: "A. Well, when Manu-Mine [became] interested in the tunnel work and I met Mr. Evans, he indicated, or definitely said, at that time, that he [Stickler] was a nephew by marriage of Mrs. Evans. Q. Did he express that to you in Turnpike Commission meetings? A. Oh, yes, it was general knowledge in the Turnpike Commission."

The testimony of Torrance also contained the following:

"Q. Now, Mr. Torrance, when did you know, sir, that the Manu-Mine Research and Development Company was going to be awarded the February 28, 1955 contract? . . . A. In my opinion, I thought they would be the contractor. . . . Q. How long prior to February

knowledge of its practice to have construction contracts competitively bid, considering the fact that Torrance knew of the relationship between Evans and Stickler, considering his friendly relationship with Stickler by reason of the work performed on Torrance's farm and the gift certificate, considering Torrance's joining with Evans in impressing Lawler with the urgency of the work and the purported good reputation of Manu-Mine in this field, together with the circumstances of the disguise of this contract, and the actual futility of the program, the guilt of Torrance is clearly established. He participated not only passively in his failure to question the contract or insist upon the customary procedures and protective provisions but he actively participated in its adoption.

By May 25, 1955, when Manu-Mine submitted its second periodical estimate for payment showing a total drilling to that time of over 21,992 feet, it was obvious that the rate of drilling had substantially increased, that this was a construction job, and that the total cost of the drilling program was becoming excessive. The magnitude of this enterpirse was evident then and should have provoked inquiry on the part of Evans and Torrance.[12]

28, 1955 did you know [think] they would be the contractor? . . . A. "Well, it could have been in December. Q. 1954? A. 1954, yes."

Cleaves, a defense witness, testified that the newspaper publicity at Wilkes-Barre as to Manu-Mine contract "involved slushing in the area and it was premature, I understand, and the Commission was very much upset about it. . . . Mr. Torrance was there . . ."

12. The magnitude of this construction work caused McNeil to request a performance bond and a labor and materialmen's bond at about this time.

Their making payments thereon and thereafter is an added circumstance demonstrative of their guilt in the conspiracy.

The defendant Paul J. McNeill was the finance director of the commission during the period of negotiating, obtaining, and performing the Manu-Mine contract. The evidence, however, fails to show that McNeill participated in any way in the negotiation and the obtaining of the Manu-Mine contract which is one of the essential fraudulent acts charged in the indictment. While it is true that a person who is not initially involved in the conspiracy may join that conspiracy in some later stage of its performance (*Com. v. Rogers*, 187 Pa. Superior Ct. 471, 482, 144 A. 2d 662), the evidence does not establish anything on the part of McNeill which aided in perpetrating the fraud or its concealment. On the contrary the evidence shows that McNeill recognized the contract as one for construction, set it up in the budget as being paid out of the construction fund and at his instance required Manu-Mine to furnish a performance bond and a labor and materialmen's bond for the protection of the commission. That he approved the payments to be made without the usual 10 per cent retention and on the basis of the billed footage may be explained as to him by the fact that he did not participate in the initial conspiracy to obtain the contract and was apparently applying the contract literally according to its provisions. In fact, a Commonwealth witness, Franklin V. Summers, assistant director of finance under McNeill, testified that he approached McNeill when he noticed that C. J. Guldin, district construction engineer, was deducting a 10 per cent retention, and that he, Summers, stated to McNeill that according to the way he read the contract the reten-

tion was not called for; McNeill simply confirmed his interpretation of the contract in this respect. The actions of McNeill were not entirely consistent with his guilt, but in some respects may have indicated an attempt to protect the interest of the commission. If McNeill were acting in furtherance of the conspiracy and for its concealment, he probably would not have given the contract the attributes of a construction contract or have belatedly required the protective bonds at a cost of $30,000 to Manu-Mine. Although we recognize that McNeill's acts and conduct displayed questionable judgment and created a suspicion as to his intentions and his connection with Manu-Mine, we cannot say that they established his guilt as charged in the indictment beyond a reasonable doubt. The judgment of sentence as to McNeill on the indictment charging conspiracy will be reversed and defendant will be discharged.

Stickler and Landsidle are so obviously implicated as to require little comment. Stickler built his company and his own personal profit almost at the sole expense of the commission. Stickler was quick to recognize the profitable possibilities available at the commission. The series of contracts let to Manu-Mine in connection with the selection of the route across the anthracite coal measures, the patrolling thereof, the preparation of data and the making of exploratory survey all evidence the favoritism utilized by Stickler. Landsidle, although he had no ownership interest in Manu-Mine, was its general manager and actively participated in the project resulting in the defrauding of the commission. Stickler and Landsidle discussed the drilling work and decied that they would propose to the commission that they be given the contract; they negotiated with the commission and

when they were questioned about the price proposed for drilling they submitted a cost analysis that was fictitious and based upon a drill which they did not at that time intend to use in the performance of the work. They performed a grossly excessive amount of drilling which was useless to the extent of as much as 95 per cent and for this they charged the commission the exorbitant price obtained by their fraudulent cost analysis. They claimed to have been performing engineering work, still when they realized the very substantial increase in the drilling rate and the sharp rise in profit therefrom they as engineers did not attempt to inform the commission of this development.

Both Stickler and Landsidle profited to a large extent from their fraud. As we have previously indicated Manu-Mine had a profit after all expenses amounting to approximately $4,000,000 under this contract, or more than 100 per cent over cost. If overhead expenses, which included substantial bonuses to employes, advertising costs, and other such expenses, are excluded, the operating profit was over $5,000,000. Included in some of the overhead expenses was furniture in the amount of $10,000 purchased by Stickler for his home; gifts to Torrance and John D. Paul; a portion of the cost of two fur coats for the wife of Stickler; and a trip by Stickler and his family to Honolulu. For the year 1955 Stickler received a salary of $32,300 plus a bonus of $35,000; Richard Evans received a salary of $10,500 and a bonus of $20,000; and Landsidle received a salary of $13,496 and a bonus of $26,700. As we have said, the stock owned by Stickler, his wife, and Richard Evans increased from $100 per share to over $42,000 per share. That Landsidle was not an owner of Manu-Mine is unimportant. He

actively participated with Stickler in the negotiation of this contract; he signed and submitted the fraudulent cost analysis; he signed and submitted the periodical estimates for payment; and he personally profited from the fraud through his substantial salary and bonus.

The evidence is sufficient to convict Stickler and Landsidle of conspiracy; it sustains as well their convictions of the crime of fraudulent pretense in obtaining the contract and in obtaining or attempting to obtain payments thereunder. The crime of fraudulent pretense is completed when there co-exists a false pretense, an obtaining of property of value thereby, and an intent to cheat and defraud. *Com. v. Hancock*, 177 Pa. Superior Ct. 585, 592, 112 A. 2d 407. In the course of negotiating for this contract Stickler and Landsidle submitted at the request of John D. Paul, the commission engineer, a cost analysis to substantiate their price of $12.50 per foot of drilling. It is unnecessary to detail the matters outlined in that analysis except to state that it purported to justify the $12.50 per foot cost of drilling on the basis of the actual cost to perform the work with a Joy No. 32 drill at a rate of 28 feet per drill per shift plus a profit of 10 per cent. The cost analysis was false. Stickler and Landsidle submitted the analysis at a time when they knew they were not going to use the drill; they knew prior to the adoption of the contract that they were going to use a heavier drill and in fact had planned for its operation. They knew that the work could not be accomplished by the drill that they proposed although it was submitted none the less in justification of the price. "A criminal false pretense has been said to be 'the false representation of an existing fact, whether by oral or written words or conduct, which is calculated to deceive,

intended to deceive, and does, in fact, deceive, and by means of which one person obtains value from another without compensation.' " *Com. v. Gross*, 161 Pa. Superior Ct. 613, 618, 56 A. 2d 303, 306. The submission of a cost analysis in justification of a price about to be inserted in a contract is a representation of an existing fact; it is a representation of the facts and circumstances of the operation upon which the price is based. Cf. *Com. v. Hancock*, supra, 177 Pa. Superior Ct. 585, 593, 112 A. 2d 407. Both Stickler and Landsidle prepared and were familiar with the cost analysis which was signed by Landsidle. It was admitted that they intended the commission to rely upon the analysis. An additional consideration is the fact that in August, 1956, after Manu-Mine had been suspended from the work, Stickler, Landsidle, and Luke prepared another cost analysis in justification of the $12.50 price. That Stickler and Landsidle intended to deceive and that they did deceive are clear beyond question; the $12.50 price which they had "justified" was incorporated into the agreement. Stickler and Landsidle obviously obtained something of value; they obtained initially the contract and thereafter, because of their initial fraud, continued to obtain payments under the periodic estimates. As to those estimates which were not paid, they were guilty of an attempt to commit the crime of fraudulent pretense.

The guilt of Evans and Torrance on counts 1 and 2 of the misbehavior in office indictments is substantiated by the evidence. Both Evans and Torrance were charged with misbehavior for corruptly participating in the negotiation and obtaining of the Manu-Mine contract, for willfully and corruptly permitting the Manu-Mine contract to become effective thereafter, and for permit-

ting payment of vast sums of money pursuant thereto. Misbehavior in office is a common law offense. *Com. v. Brownmiller*, supra, 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907. The offense occurs when there is a breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive. *Com. v. Peoples*, 345 Pa. 576, 579, 28 A. 2d 792; *McNair's Petition*, 324 Pa. 48, 55, 187 A. 498. Evans and Torrance here were charged with the performance of a discretionary act with an improper or corrupt motive. A discretionary duty must be exercised with reason as opposed to caprice or arbitrary action; the term discretion " 'imports the exercise of judgment, wisdom, and skill, as contra distinguished from unthinking folly, heady violence, and rash injustice.' " *Com. v. Brownmiller*, supra, 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907, 913. In its penal sense misbehavior in office does not encompass mere errors in judgment or departures from sound discretion, but an official must perform those official duties which require the exercise of a sound discretion to the interest of the Commonwealth and not capriciously, arbitrarily, and with a willful and corrupt design. *Com. v. Brownmiller*, supra, 141 Pa. Superior Ct. 107, 120, 121, 14 A. 2d 907. The willful and corrupt motive need not arise from personal benefit. See *Com. v. Brownmiller*, supra, 141 Pa. Superior Ct. 107, 121, 122, 14 A. 2d 907. In this instance Evans and Torrance, both of whom had many years of experience at the commission, permitted the blatant disguise of this contract, ignored their normal protective procedures, and in fact actively participated in inducing Lawler to go along with the contract by stressing its urgency and the qualifications of Manu-Mine to do the work. This they did for the benefit of

Evans' relatives, arbitrarily casting aside what should have been a proper concern for the interests of the commission. There is no reasonable conclusion other than that they favored Manu-Mine in this contract, as they had with other contracts in the past, without regard to their official obligation to the commission. This was willful and corrupt.

It is also clear that the conspiracy charge and the charges of misbehavior in office were separate and distinct and did not merge or require an election on the part of the Commonwealth. The charges and proofs of misdemeanor in office were broader than the statutory offense of conspiracy. See *Com. v. Falls and Sykes*, 107 Pa. Superior Ct. 129, 134, 162 A. 482; *Com. v. Kline*, 107 Pa. Superior Ct. 594, 604-607, 164 A. 124; *Com. v. Ackerman*, 176 Pa. Superior Ct. 80, 83, 106 A. 2d 886. The fact that both offenses related to and grew out of one transaction is not controlling; the test is whether the proof of each charge requires an additional fact which the other does not. *Com. v. Falls and Sykes*, supra, 107 Pa. Superior Ct. 129, 133, 162 A. 482. [13]

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13 In *Com. v. Falls and Sykes*, 107 Pa. Superior Ct. 129, 134, 162 A. 482, 483, it was stated: "True, the indictment for malfeasance in office was based on charges of extortion, bribery and violation of the liquor laws. The essence of that offense is a breach of official duty. If the misconduct happens to consist of the commission of other misdemeanors, there is no merger. An offender cannot escape punishment for the other offenses; they are independent crimes—the same as an agreement to commit a misdemeanor is a conspiracy. But, as we have seen, that offense is exclusive of the acts that follow; the latter is but evidence of the former. So, the other crimes, while evidence of malfeasance in office, are separate and distinct offenses. Each indictment required proof of an additional fact which the others did not."

Torrance was also charged, in the third count of the indictment charging misbehavior in office, with hampering, obstructing, and corruptly interfering with the proper and legitimate investigation of the contractual activities of Manu-Mine with the commission. Torrance argues that there is no such crime either common law or statutory. In the alternative it is argued that if there is such a crime the evidence does not sustain his conviction thereof. The Commonwealth contends that the indictment charges a common law crime under the doctrine of *Com. v. McHale*, 97 Pa. 397, 408. The doctrine of the *McHale* case is based upon the authority of Blackstone and propounds a comprehensive classification of conduct which may amount to common law offenses. According to this doctrine conduct which especially affects the Commonwealth, which is against the public peace, morals, or economy, or the due regulation and domestic order of the state, is considered a common law offense. It is stated that " ' . . . the individuals of the state like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it *comprises all such crimes as especially affect public society*, and are not comprehended under any of the four preceding series [of common law offenses].' " *Com. v. McHale*, supra, 97 Pa. 397, 408. Conduct is indictable as a common law offense under this doctrine even in the absence of specific common law precedent or statutory declaration. See *Com. v. Cano*, 182 Pa. Superior Ct. 524, 532, 533, 128 A. 2d 358. The *McHale* doctrine is applicable to such conduct which is inherently offensive

to the public peace, morals, and economy. *Com. v. Cano*, supra, 182 Pa. Superior Ct. 524, 535, 128 A. 2d 358. We think that the willful and corrupt hampering, obstructing, and interfering with a proper and legitimate investigation to the scandal, dishonor, and prostitution of public justice amount to a common law offense within the doctrine of the *McHale* case.

However, we are of the opinion that the evidence does not sustain the charge against Torrance in this instance. It appears that on February 27, 1956, the commission met with the Governor of the Commonwealth in connection with the investigation of the slushing program. At this meeting the Attorney General expressed the desire to coordinate the investigations of the contracts for drilling, casing and slushing which were being conducted (1) by the state police, (2) under orders of Attorney General, and (3) by the Secretary of Mines and Mineral Industries. Commissioners McSorley and Lawler were in general agreement with the plan but Torrance took exception to this method of procedure, and stated that the investigation should be made by the commission itself in as much as the building of the turnpike system was a responsibility of the commission. At the time of this meeting the Department of Mines had already begun its investigation. Thereafter, on March 5, 1956, McSorley took virtually the same position in a letter written to the Attorney General. There is no indication that Torrance did not otherwise co-operate in the investigations that were being conducted or that the investigations were hampered, obstructed, or subjected to interference. The Commonwealth also relies on the fact that Torrance sent copies of the reports of the investigations by the Department of Mines and the state police to Manu-Mine.

This was done, however, with the knowledge and approval of the commission counsel or the Commission Chairman McSorley, and was made known at the commission meetings. The evidence does not establish the offense charged; the conviction on count 3 of the indictment charging Torrance with misbehavior in office will be reversed.

III. Alleged Trial Errors

Numerous matters raised on these appeals relate to alleged trial errors and are set forth in support of defendants' motions for new trial. Included in this phase of the case are errors alleged to have occurred in the refusal of bills of particulars, in the consolidation of indictments for trial, in refusing defendants' requests for offers of proof, in the admission of evidence, in the refusal of defendants' points for charge, and in the charge of the court.

In reviewing the alleged errors it is well to recognize that "Mere error in the abstract is not sufficient to warrant a retrial, and where the conclusion is inescapable that the error did not influence the jury against the accused, or deprive him of his legal right to a fair trial, a new trial will not be granted." *Com. v. Linkowski*, 363 Pa. 420, 424, 70 A. 2d 278, 280. The errors must be found to have been prejudicial.

Defendants assert that it was prejudicial to refuse their motions for bills of particulars. Where an indictment is sufficient as a matter of law but does not furnish sufficient information to enable the defendant to prepare his defense, the court may order a bill of particulars to be filed. *Com. v. New Bethlehem Borough*,

15 Pa. Superior Ct. 158, 164; *Com. v. Hershman*, 171 Pa. Superior Ct. 134, 139, 90 A. 2d 314. The indictments in the instant case are sufficient in law and set forth specifically the offenses charged. A reading of the indictments demonstrates that the crimes are clearly defined, and that the details thereof are set forth with reasonable particularity. A bill of particulars, even when required, is not meant to be a specification of every item of evidence to be adduced by the Commonwealth. *Com. v. Buccieri*, 153 Pa. 535, 547, 26 A. 228.[14]

Upon motion of the district attorney, to which the defendants objected, the court permitted the consolidation of the indictments for trial. The general rule is that the court in its discretion may consolidate two or more indictments for trial where the offenses charged are similar, related, or connected unless substantial prejudice will result to the accused. *Com. v. Krzesniak*, 180 Pa. Superior Ct. 560, 567, 119 A. 2d 617. The consolidation of a conspiracy indictment with other related charges will normally not be disturbed where it appears the evidence that was admissible on the crimes charged in the other indictments tended to support the conspiracy charge. *Com. v. Dixon*, 179 Pa. Superior Ct. 1, 5, 115 A. 2d 811. The consolidation for trial of indictments charg-

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14. A related principle was recently stated:

"'The general rule is that the accused has no right to the inspection or disclosure before trial of evidence in the possession of the prosecution' . . . The matter of permitting a defendant to examine and inspect evidence in the keeping of the Commonwealth depends upon an exercise of judicial discretion in any instance and our trial courts can be trusted to exercise it wisely." Concurring opinion, *DiJoseph Petition*, 394 Pa. 19, 23, 145 A. 2d 187, 188.

ing conspiracy and misdemeanor in office has been recognized. *Com. v. Ackerman*, supra, 176 Pa. Superior Ct. 80, 85, 106 A. 2d 886. And, in general, defendants charged with conspiracy should be tried together. *Com. v. Antico*, 146 Pa. Superior Ct. 293, 311, 22 A. 2d 204.

Defendants contend that the conspiracy indictment and the fraudulent pretense indictment against Stickler and Landsidle were repugnant, and that the joint trial of these indictments resulted in prejudice in the admission, segregation, and limitation of various portions of evidence. The conspiracy indictment charged the nine defendants with an unlawful combination to defraud the commission, particularly with respect to the Manu-Mine contract of February 28, 1955, and the payment of money in accordance therewith. The fraudulent pretense indictment, in the first count, charged that Stickler and Landsidle made willful misrepresentations to the commission, its employes, and agents as a result of which they unlawfully obtained the February 28th contract from the commission, and the signatures thereto of Evans, Torrance, and Theodore S. Paul with intent to cheat and defraud the commission. The indictments are not repugnant simply because Evans and Torrance were named as principals in the conspiracy indictment and as the agents of the commission, who signed the same contract, in the fraudulent pretense indictment. The defrauded party in the latter indictment was the Pennsylvania Turnpike Commission, a separate legal entity. Act of May 21, 1937, P. L. 774, §4, 36 PS §652d. Evans and Torrance were not the victims in the fraudulent pretense indictment, their signatures represented the legal authority of the commission, which they were charged

with abusing. An entity such as the commission must of necessity act through its officers. But, if a third party colludes with some or all of the officers of the entity to obtain a contract signed by the officers on its behalf, there is none the less a fraud perpetrated upon the entity. The collusion of the officers or agents of the commission with third persons is not attributable to the commission. See *Com. v. Sanderson*, supra, 40 Pa. Superior Ct. 416, 469; *Com. v. Kirk*, 141 Pa. Superior Ct. 123, 127, 14 A. 2d 914; *Todd v. Skelly*, 384 Pa. 423, 429, 120 A. 2d 906; *Fifth Street Building and Loan Association v. Kornfeld*, 315 Pa. 406, 416, 172 A. 703. See, also, Fletcher Cyclopedia, Corporations, vol 3, §804, p. 54.

Since the indictments charge offenses which were not repugnant but in fact part of and related to the general scheme, their consolidation was not an abuse of discretion. The evidence submitted with respect to the fraudulent pretense indictment would in material respects be relevant and material to the conspiracy charge. "Although the offense of criminal conspiracy is complete the moment the agreement is made whether acts be done in pursuance of it or not, it is still proper for the Commonwealth to show subsequent acts and circumstances in fulfillment of the conspiracy." *Com. v. Bartell*, supra, 184 Pa. Superior Ct. 528, 548, 136 A. 2d 166, 177. The fraudulent pretense indictment charged the separate crimes of Stickler and Landsidle which were among the means used to accomplish the object of the conspiracy. The crimes of conspiracy and fraudulent pretense are separate and distinct. *Com. v. Kline*, supra, 107 Pa. Superior Ct. 594, 599, 164 A. 124; *Com. v. Downer*, 159 Pa. Superior Ct. 626, 633, 49 A. 2d 516.

Evans and Torrance assert that count 1 of the fraudulent pretense indictment is diametrically opposed to count 1 of the indictments charging misbehavior in office which charge misbehavior in participating in the negotiation and execution of the Manu-Mine contract. These indictments are not repugnant for the reasons just discussed. Count 1 of the fraudulent pretense indictment charges that the commission, not Evans and Torrance, was defrauded by reason of false pretense. The same is true on the claim that count 2 of the indictments charging misbehavior in office and the balance of the counts in the fraudulent pretense indictment are repugnant. Count 2 of the indictment charging misbehavior in office charges misbehavior in permitting the Manu-Mine contract to become effective and in permitting payments to be made thereunder. Counts 2 to 17 of the fraudulent pretense indictment charged Stickler and Landsidle with obtaining the various periodical payments under the contract by means of false pretense. As we view it, these charges against Stickler and Landsidle and the charge against Evans and Torrance in permitting payment are part and parcel of the same transaction, the means used to accomplish the object of the conspiracy. That the individual role of Evans, Torrance, Stickler, and Landsidle may have resulted in separate crimes growing out of the general conspiracy is no cause for complaint.

The court below stated in its opinion:[15] "In the cases at bar the four indictments involve only three types of offenses which 'either grew out of the alleged

15. The opinion of the court below reported in 72 Dauphin County Reporter 31.

conspiracy or otherwise were closely related.' The conspiracy to cheat and defraud the Pennsylvania Turnpike Commission of its moneys was accomplished when Stickler, Landsidle and Richard Evans obtained huge sums of money by fraudulent pretense. By their misbehavior in office Commissioners Evans and Torrance contributed to the accomplishment of the object of the conspiracy."

Torrance further claims that the consolidation of the indictments for trial resulted in prejudice in the admission of evidence on the misbehavior indictment. It is alleged that certain evidence was admissible only on the conspiracy charge but that the trial judge refused to limit such evidence to that charge.

It is generally recognized that where a separate offense is related to, or grows out of, the conspiracy the evidence admissible on the separate offense tends in most instances to support also the conspiracy indictment. See *Com. v. Dixon*, supra, 179 Pa. Superior Ct. 1, 5, 115 A. 2d 811; *Com. v. Quinn*, 144 Pa. Superior Ct. 400, 404, 405, 19 A. 2d 526. But the novel question raised here by Torrance is whether the converse is true, that is, whether the evidence admissible on the conspiracy charge is also itself admissible on the separate indictments, and, if not, whether it was error not to limit the evidence to the conspiracy charge. The answer must depend upon the particular offense charged in addition to the conspiracy. Here two counts of the indictment charging misbehavior in office against Torrance concerned his participation in the conspiracy in the negotiation and procurement of the Manu-Mine contract, and in his permitting payments to be made as a result of the

conspiracy. Evidence which would establish the conspiracy, within which Torrance was an actor, was relevant therefore to the separate misbehavior charge involving his participation therein. It was not necessary that every item of evidence on the conspiracy charge be directly applicable to the misbehavior charge, or otherwise require a limiting instruction by the trial judge. The crimes, although separate and distinct, were related. To establish the conspiracy was to aid in establishing that Torrance, who participated therein, had misbehaved in office in respect to the negotiation and execution of the contract and the making of payments thereunder.

Evans raises a similar contention, except that in his case the trial judge repeatedly instructed the jury that certain evidence was not to be considered on the misbehavior indictment. Generally, the trial judge gave these instructions when the evidence related to matters occurring after Evans left the commission upon the expiration of his term. Evans now contends that as the evidence in many instances was limited to the conspiracy charge it could only have the effect of confusing the jury; he thus concludes that the indictments should not have been consolidated. We see no such results. Evans admits that the rulings were "correct from a legal standpoint." The repeated instructions could only have had the effect of impressing upon the jury that Evans was not to be held on the misbehavior charge for matters occurring after he left office.

Stickler and Landsidle raise a like contention with respect to the fraudulent pretense indictment. They likewise argue that the consolidation was prejudicial because certain evidence in the conspiracy case preju-

diced them on the fraudulent pretense indictment notwithstanding the limiting instructions of the trial judge. Our examination of the record discloses no substantial harm resulting in this manner from the consolidation. One instance indicated by defendants concerned the introduction into evidence of the testimony of John D. Paul before the investigating grand jury as an admission against himself. The trial judge repeatedly cautioned the jury that the testimony was to be considered against Paul and no other defendant. Another instance concerned the testimony of five Manu-Mine inspectors as to certain irregularities in the slushing program. This testimony, offered in rebuttal, was limited to contradicting certain defense witnesses. It was thoroughly and repeatedly explained to the jury that it was received solely for that limited purpose. We cannot see how Stickler and Landsidle were prejudiced under the circumstances. The instructions were adequate and clear. For the most part the evidence demonstrated the general course of conduct tending to the same general end. *Com. v. Dixon*, supra, 179 Pa. Superior Ct. 1, 5, 115 A. 2d 811.

That the consolidation of these four indictments, charging in substance three offenses, did not result in such confusion of the jury as to convict regardless of the evidence is indicated to some degree by the fact that four of the nine defendants were acquitted in the trial. Cf. *Com. v. McHugh*, 187 Pa. Superior Ct. 568, 574, 145 A. 2d 396.

A related contention of defendants is that the verdicts on the fraudulent pretense indictment and the verdicts on the conspiracy indictment are inconsistent and repugnant because Evans and Torrance are alleged

to be the victims in the fraudulent pretense indictment and the conspirators in the other. We have shown, in discussing the consolidation of these indictments for trial, that they are not inconsistent or repugnant. It was not necessary to a conviction of Stickler and Landsidle on the fraudulent pretense indictment that the jury find that Evans and Torrance were deceived by the false representations. The indictment charged that the willful misrepresentations were made to the commission, its employes, and agents. Evans and Torrance were not the only agents of the commission. Moreover, the jury acquitted Theodore S. Paul whose signature also appeared on the contract. Having found that Theodore S. Paul was not a conspirator, the jury may have found that he, as well as other employes of the commission, was deceived by the false representations.

Defendants allege error in the refusal of the trial judge to require the Commonwealth to make offers of proof before reception of the testimony of all but the first few witnesses. Within the discretion of the trial judge, a party producing a witness may be called upon to state what is proposed to be proved by his testimony so that the court may determine whether it will be incompetent, irrelevant, or inadmissible. *Morgan v. Browne*, 71 Pa. 130, 136; *Scott v. Lindgren*, 97 Pa. Superior Ct. 483, 487. See, also, Henry, Pennsylvania Evidence, vol. 2, § 727, p. 157. The practice of requiring an offer is intended to aid the fair and orderly trial of the case; its practical enforcement depends largely upon the circumstances at the moment the question arises. *Myers v. Kingston Coal Company*, 126 Pa. 582, 601, 17 A. 891. Where persistent offers of proof are requested and would

have the effect, if granted, of unnecessarily delaying the trial and disturbing its normal course, refusal would not appear to be improper. The court below in its opinion explained the exercise of discretion: "We were convinced at the trial that to require the Commonwealth to make an offer before affording it an opportunity to ask a question on the subject concerning which the witness was called, would have obstructed rather than aided the fair and orderly progress of the trial. Moreover, in a trial lasting over seven weeks it is not likely that the defendants were taken by surprise because of the lack of offers." It is obvious that requiring an offer of proof before each Commonwealth witness testified would prolong the trial unreasonably. Although defendants may have been refused offers of proof prior to the testimony of each witness, they still had the right to object to specific questions asked of the witnesses when it appeared that such questions might elicit incompetent, irrelevant, or inadmissible testimony. We are of the opinion that the trial judge did not abuse his discretion in refusing the requests for offers of proof. See *Hill v. Canfield*, 56 Pa. 454, 457.

Defendants next allege certain errors in the admission of evidence.

Defendants contend that the trial judge erred in permitting two witnesses to testify as to the law of Pennsylvania applicable to the commission and its power to contract. At the beginning of the trial, the Commonwealth called Harrington Adams, a deputy attorney general, who read into evidence section 4 of the Act of May 21, 1937, P. L. 774, No. 211, 36 PS §652d, which created the Pennsylvania Turnpike Commission and

made it an instrumentality of the Commonwealth. Adams also read the provision in section 4 giving the commission the power to contract, with the proviso that contracts relating to construction shall be approved by the Department of Highways and that such construction be under the supervision of the Department of Highways. Adams then read into evidence the portions of the Act of September 27, 1951, P. L. 1430, as amended, 36 PS §660.2, 660.6, which created the Northeastern Extension of the Pennsylvania Turnpike and gave the commission the power to contract for its construction subject to the same approval and supervision by the Department of Highways.

John R. Rezzolla, Jr., chief counsel for the Department of Highways, also testified as to the statute. Over objection, Rezzolla read into evidence sections 401 to 406 of the State Highway Law, Act of June 1, 1945, P. L. 1242, 36 PS §§670-401 to 670-406, relating to the construction of state highways, to the requirement of advertising for proposals, to the awarding of contracts on competitive bids, and to the manner of execution of construction contracts. Over objection, Rezzolla explained the procedures within the Department of Highways relative to advertising for bids and the method of awarding contracts on bids. Likewise, Rezzolla testified that, as to contracts of the commission which are required to have the approval of the Department of Highways, the department has a liaison officer at the commission whose duty it is to render such approval, and that the Manu-Mine contract was not approved in that manner. On cross-examination, Rezzolla testified that the standard requirements in the State Highway Law, such as adver-

tisement for bids, apply only to contracts of the Department of Highways and do not set forth the standards to be followed by the commission in awarding its construction contracts. He further testified that none of the construction contracts of the commission approved by the Department of Highways were handled by the department in the same manner as its own construction contracts; and that the approval by the Department of Highways of commission contracts did not necessitate such procedure.

It is the general rule, as contended by defendants, that the trial judge, not expert witnesses, should give instructions to the jury on domestic law and its application to the case: *Com. v. Giltman,* 64 Pa. 100, 105; *Com. v. Walker,* 178 Pa. Superior Ct. 522, 528, 116 A. 2d 230. But we perceive no harmful effect in having the actual provisions of the law read into evidence, as here, from the pamphlet laws. Contrary to defense contentions, the witnesses, by reading the provisions to the jury, did not give an opinion or interpretation of the laws as applied to this case. While it may also be true that the provisions of the State Highway Law, as read by Rezzolla, were not applicable to commission contracts, this fact was brought out by defendants on cross-examination and cured any error in permitting that law to be read. It is our opinion that any error in this instance was a harmless one. *Com. v. Fugmann,* 330 Pa. 4, 17-19, 198 A. 99. The trial judge did not charge the jury that the provisions of the State Highway Law applied to commission contracts; in fact, he affirmed and read a point of defendants for charge to the effect that the provisions of the State Highway Law relating to advertisement for bids did not apply to the commission.

The Commonwealth issued a subpoena to Clyde J. Siegfried, controller of Manu-Mine, to present certain corporate books and records. The records were in the possession of Stickler. When Siegfried was called as a witness and questioned as to whether he had such records, counsel for Stickler stated that it was not desired that anything be concealed and that the records shown to be relevant would be produced. The trial judge ordered the records requested by the Commonwealth to be produced and the witness thereafter testified therefrom. It is alleged that the manner of calling for the production of the records was prejudicial, and that the trial judge had no power to order a defendant to produce corporate records.

It is true of course that the Commonwealth may not call upon a defendant, in the presence of the jury, to produce incriminating evidence against himself. *Com. v. Valeroso*, 273 Pa. 213, 216 116 A. 828; *Com. v. Hubbard*, 65 Pa. Superior Ct. 213, 216. But the privilege against self-incrimination in this respect does not extend to corporate records. "It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. A corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated . . . Nor may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production." *Curcio v. United States*, 354 U. S. 118, 122, 77 S. Ct. 1145, 1 L. Ed. 2d 1225, 1229. The books and papers of a corporation are not the property of the officers and may be used against them. *McElree v. Darlington*, 187 Pa. 593, 595, 41 A. 456.

That the colloquy between counsel and the trial judge took place before the jury was due primarily to counsel. Counsel interrupted the questioning of Siegfried relative to the subpoena by stating that the documents were in the possession of Stickler, and that they would be produced if shown to be relevant. Counsel could easily have made the remarks at side bar beyond the hearing of the jury if it were so desired. The contention is without merit.

It is next argued that the trial judge erred in admitting into evidence as business records the engineering tabulations attached to Commonwealth's exhibits 30 to 49, inclusive, and in the use made of these exhibits. Exhibits 30 to 49 are the periodical estimates for payment submitted by Manu-Mine under the contract. Attached to those periodical estimates are the measurements taken by the commission inspectors which indicate that their measurements of certain holes showed a depth short of the footage billed by Manu-Mine. Despite the short-of-billed footage appearing on the estimates, Manu-Mine was paid for the amount billed without deduction of the shortage. On the basis of the exhibits and the testimony in connection therewith, the trial judge submitted to the jury the question whether Manu-Mine had sent in estimates and received payments for holes actually short-of-billed footage.

It is contended that these tabulations were improperly admitted as business records; that the testimony actually indicated that there was no shortage in the drilled footage; and that to submit this question to the jury was to permit a conviction of defendants on a charge for which they were not indicted.

We think the tabulations were properly admitted as business records under the Uniform Business Records as Evidence Act of May 4, 1939, P. L. 42, 28 PS § 91b. Business records are competent evidence, in so far as they are relevant, if they are properly authenticated. The Act does not make records relevant or competent per se. It must be shown that the evidence has relevancy to the issue being tried, and the trial judge must be satisfied that the sources of information, method, and time of preparation were such as to justify its admission. *Haas v. Kasnot,* 371 Pa. 580, 586, 92 A. 2d 171. The custodian or other qualified witness must testify to the identity of the document, the mode of its preparation, and whether it was made in the regular course of business at or near the time of the event. The engineering tabulations attached to the periodical estimates meet these tests of authenticity. The witness Franklin V. Summers, who was the assistant director of finance and audit under McNeill at the time of the Manu-Mine project, testified that these engineering tabulations accompanied the periodical estimates submitted by Manu-Mine to the commission, and that they were prepared by the district construction engineer, C. J. Guldin, or under his direction. Guldin testified that he attached the engineering tabulations to the Manu-Mine periodical estimates indicating, inter alia, the short-of-billed footage, and that these records were prepared on the basis of the records turned in by the inspectors. The Commonwealth did not call the inspectors who measured the holes but the defense did. The inspectors testified that they measured the holes, and that these measurements were turned into the field office which was in charge of Guldin.

The records and the testimony in connection therewith indicated that the billing of Manu-Mine was in excess of the depth found by the measurements of the commission inspectors. It is argued that there was a valid reason for the discrepancy and that the explanation, coming from the Commonwealth witnesses, indicated that the commission was not cheated or defrauded. With this we do not agree. The tabulations on exhibit 30 carried a notation that the holes short-of-billed footage were due to placing casing into the drilled holes which knocked loose dirt and rock therein; that certain of the holes were clogged due to deposits of material from a nearby stream; and that the drilling contractor "will clean out short holes before slushing operations are started." Summers testified that he was of the impression that the short-of-billed footage indicated that a stoppage had occurred which would be cleaned out by the contractor and that the hole had actually been drilled to the depth indicated by the billed footage. Guldin testified to the same effect, and stated that, to the best of his knowledge, there was not a single hole billed which had not been drilled to the depth shown in the billed footage. However, except for spot checks of the holes short-of-billed footage, no complete re-check was made to determine whether the holes originally short or blocked were subsequently opened to the billed depth. The inspectors testified similarly.

The testimony of the inspectors and of Guldin and Summers was not the sole evidence in this regard.

The witness George D. Oswald, who was employed by Sullivan Trail Coal Company and Rogers Construction Company in performing the actual slushing into

the voids, testified that he found the holes collapsed or filled with dirt and rock and unable to take more than a token amount of slushing material. He stated that about 60 per cent of the holes would not take the material, or more than a negligible amount, while the remaining 40 per cent took considerably less than the estimated amount of material; the holes were collapsed or blocked. Oswald added that, in certain instances when Manu-Mine discovered holes collapsed or blocked, it would simply drive several lengths of casing into the hole, causing more blockage, with the result that such hole would take only about a ton of silt as compared with the estimated 2,200 tons of silt per hole contemplated in the slushing program.

It must be remembered that the entire purpose of the Manu-Mine contract was ostensibly to drill holes down to the voids which were to be filled with silt. The holes were the means by which the silt was to be introduced into the voids. It is therefore immaterial whether the holes were originally drilled to the depth billed; the holes could serve no purpose under the contract unless they were cased to the full depth and were suitable for introducing the silt into the underground chambers. Since the holes did not meet this purpose to the fullest extent, or even to an appreciable extent, the billing for the total amount shown on the drillers' logs was properly considered evidence of the fraud perpetrated through the conspiracy and under the contract.

Submitting these questions to the jury did not result in the conviction of defendants of a crime for which they were not indicted, as in *Com. v. Graham*, 170 Pa. Superior Ct. 343, 345, 85 A. 2d 632, and *Com. v. Vardelle*, 70 Pa. Superior Ct. 241, 244, 245. The conspiracy indict-

ment charged that defendants contrived to defraud the commission, inter alia, "by cunning and stealth permitting the perpetration, camouflaging and nondiscovery of multitudinous acts whereby the Tunrpike Commission was charged with and defrauded of millions of dollars . . ." In a conspiracy indictment, particularly one involving fraud, there is a great latitude in the reception of evidence relevant to the scheme devised and the means used to accomplish the objective. *Com. v. Sanderson*, supra, 40 Pa. Superior Ct. 416, 472, 473; *Com. v. Berman*, supra, 119 Pa. Superior Ct. 315, 326, 181 A. 244; *Walter J. Scanlan & Son v. Sherbine*, supra, 382 Pa. 376, 379, 114 A. 2d 900; *Glessner v. Patterson*, 164 Pa. 224, 229, 30 A. 355; *Com. v. Bartell*, supra, 184 Pa. Superior Ct. 528, 548, 136 A. 2d 166.

Defendants allege that it was prejudicial error for the trial judge to admit into evidence the investigating grand jury testimony of John D. Paul, one of the defendants who was acquitted by the jury. The testimony was presented to the jury as an admission against Paul. The Commonwealth offered it against all defendants, but the trial judge was of the opinion that testimony given before the investigating grand jury was not in furtherance of the conspiracy and did not promote or advance the common unlawful object. Therefore, before the testimony was introduced, the jury was instructed that it was restricted to John D. Paul and was not to be considered against any of the other defendants. The testimony was lengthy. It is the contention of defendants that notwithstanding the fact that the trial judge instructed the jury that this testimony was to be considered as an admission against John D. Paul only, it nevertheless contained material which was so prejudi-

cial to the other defendants as to have been improperly admitted. It is argued that such testimony of Paul was not admissible at all because it was not an admission but an attempt by Paul to exculpate himself while inculpating the other defendants; that those portions containing references to the other defendants should not have been read to the jury along with the admissions of Paul; and that the trial judge, althought he gave cautionary instructions to the jury when the testimony was received and in the course of his charge, nevertheless improperly utilized the testimony to the prejudice of the other defendants in discussing their role in the conspiracy and fraud.

The testimony of Paul was a detailed recitation of his knowledge of the functioning of the Turnpike Commission, particularly with reference to the Manu-Mine contract. As such it necessarily would involve statements concerning the other defendants. The testimony was certainly admissible against Paul. It contained admissions notwithstanding the fact that it was not an unqualified confession of guilt. "An 'admission' as applied to criminal cases has been defined as a 'statement by defendant of a fact or facts pertinent to the issues and tending, in connection with proof of other facts or circumstances, to prove the guilt, . . . but which is, of itself, insufficient to authorize conviction; it is a circumstance which requires the aid of further testimony to generate a reasonable conclusion of guilt.' . . . Voluntary statements made by a defendant, although they may not amount to a confession of guilt, can be used against him if they tend to explain issues on trial, . . ." *Com. v. Elliott*, 292 Pa. 16, 20, 140 A. 537, 538. Generally, where the Commonwealth desires to prove certain admissions

of a defendant, it is not necessary to put in evidence his entire previous testimony. *Com. v. House*, 6 Pa. Superior Ct. 92, 104. But the entire testimony may be received as an admission where the defendant is charged with participation in a complicated criminal endeavor involving many related facts, incidents, and circumstances, most of which are set forth in the prior testimony. In such a case his entire testimony may be viewed as a whole to ascertain the full extent of defendant's admission as to his participation in the criminal plot. The testimony of Paul provided a thorough picture of this complicated conspiracy and his participation therein, whether innocent or guilty; it was properly admitted as a whole against him. The fact that the jury subsequently acquitted him does not retroactively affect the admissibility of his prior testimony. *Com. v. Berman*, supra, 119 Pa. Superior Ct. 315, 323, 326, 181 A. 244.

In a joint trial the acts and declarations of a conspirator made after the conspiracy has ended are admissible against that defendant so long as the jury is properly instructed on the limited purpose and effect of the admissions. This is true notwithstanding that the admission may make reference to the other defendants. Such was the situation in *Com. v. Berman*, supra, 119 Pa. Superior Ct. 315, 329, 181 A. 244. We there stated (page 329 of 119 Pa. Superior Ct., page 249 of 181 A.): "A statement by one of several codefendants which is in the nature of a confession is admissible in evidence under proper instructions, although such a statement may indirectly influence the minds of the jury against the other defendants on trial. . . . The mere fact that evidence legally admissible against one of several defendants may prejudice his codefendant is no reason for its

exclusion. . . . The Cummings statement set forth what he said he knew of the conspiracy charged, and his version of his connection with it. Such a voluntary statement by a defendant is admissible against him, although it may not contain an unqualified admission of guilt. . . . The statement by Cummings, that the scheme with which he was connected proved unfair and unethical and a scheme to defraud customers, was relevant and admissible, although he endeavored to impute the fraud to what he called the 'Berman group.' It might properly be inferred from his statement that he knew more about the scheme than he disclosed. The evidence being relevant, it was immaterial that the statement contained an expression of opinion by Cummings which might be detrimental to the appellant, a codefendant; and it was admissible if sufficiently limited by proper instructions." See, also, *Com. v. Dolan*, 155 Pa. Superior Ct. 453, 458, 38 A. 2d 497; *United States v. Griffin*, 176 F. 2d 727, 729, certiorari denied, 338 U. S. 952, 70 S. Ct. 478, 94 L. Ed. 588.

The contention that, at the time the admission was offered, there was not sufficient other evidence of the conspiracy is without merit. The admission was introduced almost at the end of the Commonwealth's case. There was sufficient proof of the conspiracy at that time. As said in *Com. v. Zuern*, 16 Pa. Superior Ct. 588, 604: "The proof of the conspiracy at the point in the trial when the declarations are sought to be introduced, need not be conclusive, but only slight, in order to permit the introduction."

At the inception of the reading of the testimony of John D. Paul, the trial judge admonished the jury that "this witness is about to be questioned concerning cer-

tain testimony alleged to have been given by one of the nine defendants in the conspiracy case, John D. Paul. The testimony you are about to hear, we emphasize, is restricted to John D. Paul alone. It applies to him alone and to no other defendant. You will keep that in mind as the testimony is given, and that applies in all of the cases that are before you for trial." This admonition was repeated later at the request of defense counsel. In the charge the trial judge instructed the jury on at least five occasions that the testimony of John D. Paul was restricted to him alone and was not to be considered against the other defendants. In addition, at the request of Evans in his points for charge, the trial judge reiterated the admonition on two occasions. We think the instructions were adequate. There was sufficient evidence presented to substantiate the conviction of the four remaining defendants, unaffected by the admission of the Paul testimony. We do not believe that the circumstances are such that the jury disregarded the admonitions of the trial judge. See *Com. v. Fugmann*, supra, 330 Pa. 4, 17-19, 198 A. 99; *Com. v. Novak*, 165 Pa. Superior Ct. 576, 581, 69 A. 2d 186. The verdicts indicate otherwise.

Moreover, it is not entirely clear that the statement of Paul was not admissible against all defendants on the basis that it was a declaration by a co-conspirator made at a time when the conspiracy had not ended. See *Com. v. Wilson*, 394 Pa. 588, 607, 148 A. 2d 234. At the time the statement was made and even at the time of trial, there was a suit pending in the Dauphin County court by Manu-Mine to collect the unpaid balance for the work performed under the contract, the fruits of this conspiracy. This could be considered evidence that

the conspiracy was still in effect at the time Paul made his statement. See *Com. v. Strauss*, 89 Pa. Superior Ct. 82, 91; *Com. v. Girardot*, 107 Pa. Superior Ct. 274, 277, 278, 163 A. 362. However, there is doubt in our minds, as there was in the mind of the trial judge at the time the testimony was offered, as to the applicability of that rule to this case; we do not base our conclusion thereon. See *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790. It would appear that the testimony of Paul was not given in furtherance of the conspiracy. See *Com. v. Wilson*, supra, 394 Pa. 588, 607, 148 A. 2d 234.

We note also that no specific exceptions were taken to the charge of the court in respect to the manner of the use of the Paul testimony. Objection had been made to the introduction of the testimony. *Com. v. Black*, 186 Pa. Superior Ct. 160, 166, 142 A. 2d 495.

Another contention of defendants is that the trial judge erred in permitting the Commonwealth to introduce certain rebuttal testimony at the close of the defense. The Commonwealth called five former Manu-Mine inspectors to rebut testimony given by Harry Luke and Stickler that they had no knowledge of irregularities in the slushing operations. Luke was the chief project engineer of Manu-Mine. The irregularities referred to were those in which one of the slushing contractors, Rogers Construction Company, a partnership consisting of Joseph Rogers and Amos Rogers, fraudulently induced the inspectors of Manu-Mine to give false weight slips for the amounts of materials which were allegedly slushed into the voids through the holes drilled by Manu-Mine.

Luke had testified on direct examination that, in connection with the performance of his duties on the construction of the Northeastern Extension, he knew of no one who entered into any unlawful agreement or undertook to do any illegal or improper acts. He reiterated this on cross-examination.

Defendant Stickler testified on cross-examination that it was the alleged irregularities concerning the slushing which caused the Manu-Mine separation from the commission, and that he was of the opinion that these irregularities were not substantiated or the charges justified. The Commonwealth witness Oswald testified, as we have indicated, that the holes drilled by Manu-Mine would not accept an appreciable amount of the silt which Rogers had contracted to supply to the commission, and that as a result some way had to be found to dispose of the material. They devised the scheme of bribing the Manu-Mine inspectors to give the false weight slips and to permit the dumping of truck loads of silt about the countryside. See *Com. v. Rogers*, supra, 187 Pa. Superior Ct. 471, 475, 144 A. 2d 662; allocatur refused.

The Commonwealth offered the testimony of five former Manu-Mine inspectors, who were involved in the Rogers fraud, for the purpose of attacking the credibility of Luke and Stickler. The trial judge, over objection, permitted the testimony. The jury was instructed that it was not evidence that any offense was committed by any of the defendants, and that it was to be considered for the sole purpose of aiding the jury in passing upon the credibility of Luke and Stickler with respect to their testimony about the irregularities in the slushing

program. The testimony of these five rebuttal witnesses was to the effect that, as Manu-Mine inspectors, they had entered into the agreement to give fictitious weight slips for loads of silt not delivered and to look the other way when silt was dumped about the countryside. They testified that they knew that the commission consequently was making payments to Rogers which were not properly due and that the commission was cheated by their conduct. None of the witnesses imputed knowledge of these irregularities to Luke or Stickler.

Defendants contend that this was highly prejudicial testimony in that it was not proper rebuttal to the testimony of Luke and Stickler, and that its effect was to permit the jury to hear evidence of crimes which were not charged in the indictments and in which no defendant was a participant.

A witness cannot be contradicted on matters which are not germane to the issue being tried, that is, on a collateral matter. *Com. v. Petrillo,* 341 Pa. 209, 223, 19 A. 2d 288; *Com. v. Burdell,* 380 Pa. 43, 50, 51, 110 A. 2d 193. Whether the evidence relates to a matter which is collateral depends upon its admissibility for some purpose independent of the contradiction. *Com. v. Petrillo,* supra, 341 Pa. 209, 224, 19 A. 2d 288. It is equally true that evidence of crimes other than those charged in the indictment is not admissible unless it serves one of the recognized purposes of evidence of that nature. Likewise, in *Com. v. Wable,* 382 Pa. 80, 84, 114 A. 2d 334, 336, it was said: ". . . evidence of other crimes *is* admissible when it tends to prove a common scheme, plan or design embracing the commission of two or more crimes so related to each other that proof of one tends to prove

the others . . ." The testimony of the inspectors concerned a fraud in which they and Rogers engaged apparently without participation by any of these defendants.

Separate and disconnected acts and declarations of persons who were not defendants, or shown in any way to have been connected with them, made in their absence without their knowledge may not be admitted in the trial of the defendants. *Com. v. Duffy,* 49 Pa. Superior Ct. 344, 355. But this was not a case of introducing other distinct crimes which might prejudice the trial of these defendants. The testimony of the Manu-Mine inspectors was not limited to the commission of crimes. They testified to facts existing in the slushing operation which, by reason of the contract, was under the direct supervision of Manu-Mine.[16] Oswald had testified that the Rogers fraud and conspiracy arose because the holes drilled by Manu-Mine were in such condition that the material which Rogers was supplying could not be used for the contemplated purpose. The fraudulent scheme was devised by Rogers and the Manu-Mine inspectors to charge for the undelivered silt or dispose of it and to receive payment from the commission for material not used in the slushing program. That this evidence showed criminal conduct on the part of the Manu-Mine inspectors and Rogers does not affect the admissibility of the facts concerning the failure of the drilling and supervising program of Manu-Mine to meet its ostensible purpose. We have previously noted that there is wide latitude in a trial on an indictment for conspiracy to defraud. Cer-

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16. For supervision of the slushing program Manu-Mine was paid $121,722.90.

tainly the inability of the holes drilled by Manu-Mine to accept more than a negligible amount of the silt contemplated in the slushing program, and the fraudulent acts of the inspectors were the direct result of the original conspiracy and fraud perpetrated in obtaining the Manu-Mine contract and in the performance thereof. The evidence presented by the Manu-Mine inspectors was directly related to the conspiracy. The testimony of these inspectors was an elaboration upon and corroborative of that of Oswald which had been presented in the Commonwealth's case in chief. The testimony did not relate to a collateral matter but to one germane to the issue, and it was proper to permit it in rebuttal. Where evidence would have been admissible in the Commonwealth's case in chief it may properly be received in rebuttal for the purpose of contradicting the testimony offered by the defendant. This is a matter which is largely within the discretion of the trial judge. *Com. v. Adams*, 174 Pa. Superior Ct. 504, 508, 102 A. 2d 202. It is noted that the trial judge clearly limited the testimony to the narrow issue of credibility on one phase of the defense testimony.

It is next argued that the trial judge erred in permitting the Commonwealth witness James H. Pierce to interpret and comment upon the contract of February 28, 1955. Pierce, an engineer of considerable experience in mining, and construction engineering in general, testified on behalf of the Commonwealth as an expert. Defense counsel objected to this testimony. He gave as his opinion that the language in the contract, with the exception of one portion thereof, was constructural; in fact, that it was a construction contract. He

stated further that the contract was an unusual one in that it contained no specifications, that there was no limitation on the number of feet to be drilled, that there was no re-negotiation clause in view of the cost analysis submitted by Manu-Mine, no escalation clause, no usual retention clause, and no requirement of a performance bond. We think the testimony of this expert, as well as that of the other experts who testified on behalf of the Commonwealth, was admissible. "Expert testimony is admissible in all cases, civil and criminal alike, when it involves explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience." *Com. v. Nasuti*, 385 Pa. 436, 443, 123 A. 2d 435, 438.

Certainly the contract of Manu-Mine was unusual. It was the contention of the Commonwealth that the contract related to construction although it was made to appear to be an engineering contract as a means devised by the conspirators to defraud the commission. Under the law construction contracts of the commission are required to bear the approval of the Department of Highways. Other evidence indicated that it was a general procedure of the commission that construction contracts be submitted for bids, have a retention clause, and require a performance bond. If this contract was disguised as an engineering contract to avoid the normal procedure of competitive bidding, to avoid the normal manner of approval by the Department of Highways, and consequently to avoid discovery of the fraud, then it was important that the question of its true nature, engineering or construction, be thoroughly investigated. The fields of construction and engineering as they relate to surface support, drilling, and slushing are certainly

not within the realm of common knowledge, intelligence, and understanding; they require specialized training. The Commonwealth therefore properly introduced evidence in the form of the testimony of experts to establish that this was in reality a construction contract in whole or in major part. Drilling for the purpose of reaching the voids to be flushed was, in the opinion of the experts, construction work; and it was on the basis of the price charged for drilling and the amount of drilling done that Manu-Mine received virtually all of the payments under this contract. We recognize that it is normally the duty of the court to interpret a contract; however, when that interpretation requires technical and expert knowledge the testimony of experts may be received to aid in that interpretation. Actually Pierce was not interpreting this contract or the Act of the Legislature; he was testifying from his expert knowledge and experience as to the nature of the *work* to be performed under the contract, as to the manner in which that work was disguised by the wording of the contract, and as to the lack of provisions which appear in the usual construction contract for work of this nature. Cf. *Com. v. Sanderson*, supra, 407 Pa. Superior Ct. 416, 467. The testimony was properly admitted and submitted to the jury in connection with the means devised by the conspirators to succeed in their plan. That these requirements were not technical legal requirements is of little significance in view of the fact that the commission had adopted them as a general practice in the case of construction contracts.

Defendants further contend that there was error in submitting to the jury the question whether the contract of February 28, 1955, was a construction contract. The

trial judge instructed the jury to determine whether the contract was an engineering or construction contract and to consider, if it were a construction contract, whether it should have been competitively bid. Defendants assert that the instructions had the effect of making the jury's verdicts depend upon whether or not the jury considered the contract a construction contract. They argue that under the instructions, if the jury considered the contract a construction contract, it would be obliged to convict since the contract was not awarded after competitive bidding. Actually the nature of this contract was a basic issue. The failure to have had the contract submitted for bids was likewise an important factor in the fraud.

The Commonwealth experts had testified that the drilling, the major portion of the work under the contract, was clearly construction. The evidence of the Commonwealth also established that, with some exceptions, the contracts on the Northeastern Extension relating to the construction of the roadway, is grading, drainage, and structures, were competitively bid, and were approved by the Department of Highways in the normal manner established at the commission. It was shown that many contracts that were not competitively bid, such as those for items of equipment, paint, and traffic signs, nevertheless contained the requirement of a performance bond and a labor and materialmen's bond, and a retention clause. Even though there may have been no legal requirements for competitive bidding, the inclusion of performance and labor and materialmen's bonds, retention clauses and similar provisions, the fact of the matter is that the commission had made a practice,

which it admittedly varied at times, that its contracts be competitively bid, be accompanied by the ordinary bonds, and provide for a retention clause. Defendants attempt to use the lack of any legal requirement of these provisions to justify their action. That was for the jury. In the trial of a case of this nature involving fraud such matters are relevant. This conspiracy to defraud was perpetrated in the negotiation, the obtaining, and the performance of the contract of February 28, 1955. Where advantage is taken of technicalities to perpetrate a fraud, they may not be set up in defense thereof after conviction; a fraudulent conspiracy being shown, defendants cannot now hide behind the fact that these omitted contract provisions were not legal requirements. Defendants' acts and deeds in obtaining the contract, in its execution, and in its performance are relevant considerations in determining the existence of the conspiracy and the nature of the fraud. The peculiar nature of the contract, its disguise, its failure to have the usual provisions, its failure to have been competitively bid under the circumstances, the nature of the work performed under the contract, the price charged therefor were all matters for the consideration of the jury in determining whether this was actually a conspiracy to defraud. See *Com. v. Sanderson*, supra, 40 Pa. Superior Ct. 416, 471, 472.

The subsequent handling of this contract corroborated the Commonwealth's theory. The Manu-Mine contract was treated as an engineering contract in the negotiations and was adopted by the commission as an engineering contract. Afterwards, in the course of its performance, it was treated as a construction contract.

For example, the periodical estimates for payments were submitted on the regular contract form of the commission for construction work and Manu-Mine is referred to therein, in the various certificates, as "contractor." The certificate on each of the periodical estimates signed by Landsidle as general manager of Manu-Mine is to the effect that all of the work has been performed in accordance with the "terms and conditions of the corresponding construction contract documents." Some time after its execution the contract received a number in the sequence of construction contracts, and a standard construction performance bond and labor and materialmen's bond were requested and dated back to the time of the contract.

We are unable to agree that defendants were harmed by the submission to the jury of the question whether this was a construction contract. Actually if the trial judge had charged as a matter of law that the contract was definitely a construction contract or definitely an engineering contract, as defendants contend should have been done, it would have been error for the trial judge not to have said that this was a construction contract. All the testimony and the circumstances concerning the nature of the work done and the method of handling this contract after it was obtained point unequivocably to the fact that it was a construction contract.

It was not error to submit to the jury the question whether this contract should have been competitively bid. The evidence showed that, with one exception, all of the roadway construction contracts on the Northeastern Extension were competitively bid. It was also demonstrated that with some exceptions other contracts

were competitively bid. This was not an invariable practice, but it was generally followed and was a relevant consideration in this case. The jury was not instructed that, if it found that the Manu-Mine contract was a construction contract, it then, as a legal requirement, must have been competitively bid. The trial judge instructed the jury that it was to consider whether it should have been so bid. The failure had bearing on this case in demonstrating the method used by the conspirators to avoid the discovery of their fraud and to avoid the possibility that some other contractor might obtain the drilling contract, particularly since the price charged was shown by the evidence to have been exorbitant. Clearly this was a matter for the jury to consider in determining whether or not these defendants were guilty of the conspiracy to defraud. The awarding of this contract, in view of the general practice of the commission relating to construction contracts, was a significant factor in the scheme devised by defendants.

Defendants complain that the trial judge refused their points for charge relating to the absence of a statutory duty upon the commission to advertise for competitive bidding. It is true that the trial judge refused such a point for charge. However, the jury was charged that the provisions of the State Highway Act relating to the advertising for public bidding did not apply to the Turnpike Commission; that the Northeastern Extension Act specifically authorized the commission to enter into all contracts necessary for the performance of its duties, and that the only limitation on its power was the requirement that construction contracts be approved by the Department of Highways.

The trial judge also charged that the evidence showed that the commission had exercised its discretion in contracting; and that in some instances construction contracts were let on competitive bidding and in other cases were entered into as a result of negotiation. Under the circumstances it was not error to refuse the point for charge requested. The jury could not have been under the impression, from the charge or the evidence, that there was any statutory duty upon the commission to have its construction contracts competitively bid. The matter was made clear to the jury by the charge of the court and the points of defendants which were read; it needed no further elaboration.

The trial judge refused points of defendants for charge to the effect that the vote of Joseph J. Lawler, in favor of the contract of February 28, 1955, as an ex officio member of the commission by virtue of his office as Secretary of Highways, had the legal effect of giving the approval of the Department of Highways to the contract as required by the statute. Defendants contend that the trial judge erred in refusing thus to submit to the jury the question whether the vote of the Secretary of Highways constituted approval of the Department of Highways to the contract of February 28, 1955. We do not think it was error to refuse this point. The guilt or innocence of these defendants did not depend upon any technical approval given by Lawler when he voted in favor of the contract. The evidence indicated that the Department of Highways maintained at the commission a staff member whose duty it was to examine construction contracts which required approval of the Department of Highways and to give such approval if the contracts were found to be satisfactory. This normal pro-

cedure was admittedly not followed in the case of the Manu-Mine contract. The significant factor was not any technical approval by the Secretary of Highways when he voted for the contract but rather the conduct of the defendants in failing to follow the normal procedure for such approval and through the normal channels. Whether the vote of Lawler constituted in the strictest legal sense the approval of the Department of Highways is a question which need not be decided. See *McIntosh Road Materials Company v. Woolworth*, 365 Pa. 190, 210, 74 A. 2d 384. Even if it did, the defendants could not take refuge behind this technicality when the evidence demonstrated their efforts to avoid approval through the normal channels by the disguise of this contract as an engineering contract, by their failure to have the contract competitively bid, and by their failure to provide the usual protective clauses of construction contracts.

Defendants submitted several points for charge dealing with the nature and effect of opinion evidence. The trial judge affirmed three of the four submitted points on opinion evidence to the effect that opinion evidence is not the same as factual evidence and that the jury is not bound to follow opinion testimony, especially where such testimony is of a contradictory nature. The points left for the jury weight to be given to opinion testimony and the jury was specifically charged that it was not obliged to believe the opinions expressed by experts. One of the points on opinion testimony was not affirmed and defendants cite this as error. The refusal of this point was not prejudicial. The affirmance of the other points submitted by defendants adequately covered the nature, effect, and weight to be

given expert testimony and presented the matter clearly to the jury.

Among defendants' complaints is the refusal of the trial judge to affirm a point for charge on the subject of political bias. The defendants had submitted two points on this subject. One the trial judge modified, affirmed, and read to the jury; the other was refused. The point affirmed related to bias, interest, prejudice or animosity of any witness to be considered by the jury in determining credibility. The other point concerned a generalized statement on political bias in the institution of the proceedings against defendants. Aside from the fact that the point was too general and nebulous, it is clear that the motive for instituting proceedings is not a relevant consideration at the trial except as it bears on credibility. See *Com. ex rel. Flower v. Superintendent of Philadelphia County Prison*, 220 Pa. 401, 409, 69 A. 916. A defendant cannot escape criminal liability, where the evidence indicates guilt, on the basis that the motive of the prosecutor may have been other than the proper administration of justice. The motive may be relevant on the question of credibility of any witness who testifies and the point in this regard requested by defendants was affirmed.

Evans contends that it was error to refuse a series of points which were submitted to the effect that the contract with Manu-Mine could not have been approved without the affirmative vote of the majority of the members of the commission, and that the vote of Evans alone was not sufficient to approve the contract or authorize its execution. It was not reversible error to refuse these points under the circumstances. The evidence had indicated that the contract was negotiated

and disguised as an engineering contract, and that at the meeting of February 28, 1955, Manu-Mine was made to appear as a firm of international good reputation; it was also stated at this meeting that this contract and the work thereunder were of immediate importance for the expeditious construction of the turnpike extension. That the contract could not have been approved without the vote of a majority of the members of the commission was unimportant in view of the fact that the contract was in fact approved, and that it was disguised to obtain that approval. The fact that a fraud succeeds and results in action being taken by some innocent parties, such as the members of the commission who were not involved in the fraud, cannot form the basis for relieving those who are parties to the scheme.

It is alleged that the trial judge erred in refusing points for charge that the contract of February 28, 1955, contained no provision relating to profits; and that the contract was a fixed price contract which could not be converted into a cost plus contract. It is true that the contract did not contain any provision relating to profit and that it provided a fixed unit price of $12.50 per foot for drilling. There was no question in this case, nor was it the contention of the Commonwealth, that this contract contained any provision relating to profits or that the $12.50 per foot of drilling was anything other than a fixed unit price in the contract itself. The issue was, however, the fraud in the negotiation of the contract and the submission by Manu-Mine of a cost analysis prior to execution of the contract which purported to justify the $12.50 per foot price for drilling. The contention of the Commonwealth was, and the evidence in support thereof indicated, that although the contract contained a fixed

price of $12.50 per foot this price was obtained by reason of the fraud and the conspiracy. The cost analysis submitted prior to execution of the contract was one of the significant methods of perpetrating the fraud. Since the fraud was in the awarding of the contract and the performance thereof, the circumstances leading to the obtaining of the contract were relevant consideration, not just the provisions appearing in the contract. *Com. v. Sanderson*, supra, 40 Pa. Superior Ct. 416, 471. Consequently it was not error to refuse the requested points.

Stickler contends that it was error to submit to the jury count 22 of the fraudulent pretense indictment which charged him with an attempt to obtain funds from the commission by means of the false pretense. The basis for count 22 of the indictment was the civil suit pending in the Dauphin County Court to collect the balance of $833,000 allegedly due under the contract. The false pretense related back to the initial analysis of the drilling price submitted by Manu-Mine. The $833,000 was largely a duplication of the amounts involved in counts 18 to 21 of the fraudulent pretense indictment, but it was based on the additional attempt to collect that money by means of the lawsuit after the submission of the periodical estimates. The evidence supported the charge. The witness Summers and defendant Stickler testified that Manu-Mine brought the suit to recover the balance due under the contract. The filing of the civil suit to collect the fruits of a conspiracy has been held to keep alive the conspiracy; it amounts to an attempt to collect the object of the fraud and of the false pretenses which formed the basis of the conspiracy. See *Com. v. Strauss*, supra, 89 Pa. Superior Ct. 82, 92; *Com. v. Girardot*, supra, 107 Pa. Superior Ct. 274, 277, 163 A. 362.

Stickler also contends that the separate sentences on several counts of the fraudulent pretense indictment are unlawful because the evidence allegedly showed only one false pretense. The fraudulent pretense indictment contained 22 counts. The first count charged the obtaining of the contract by reason of the false representation concerning the drilling price analysis; counts 2 to 22, inclusive, charged the obtaining or attempt to obtain funds under the periodical estimates by reason of the false representation on the price breakdown. Stickler says that there was in reality at most one false representation in the submission of the initial cost analysis. He argues that the gist of the offense of fraudulent pretense is the false representation, not the obtaining of the periodical estimates, hence the periodical estimates represent the result of but one crime. We cannot agree with the argument. The crime of fraudulent pretense involves not only the false representation, whether oral, written, or by conduct, but also the obtaining of something of value as a result thereof with intent to defraud. See *Com. v. Thomas*, 166 Pa. Superior Ct. 214, 216, 70 A. 2d 458; *Com. v. Prep*, 186 Pa. Superior Ct. 442, 446, 142 A. 2d 460. The evidence in this case indicated that Stickler and Landsidle falsely represented to the commission and its employes that the price per foot of drilling was a justified one in view of the cost breakdown submitted to the commission. As a result of that representation they obtained not only the contract but the payment of various sums in the performance thereof as each periodical estimate was submitted. Each periodical estimate was a separate obtaining of funds or an attempt to obtain funds by reason of the false representation of the drilling price. Each time a periodical estimate was submitted

Manu-Mine received or attempted to receive additional value and it did so only because of the original fraud. This is not comparable to those cases in which there is but one criminal act or transaction as in *Com. v. McCord*, 116 Pa. Superior Ct. 480, 488, 176 A. 834, and *Com. v. Baker*, 115 Pa. Superior Ct. 183, 188, 175 A. 438.

Torrance contends that the charge of the court prejudiced him in several respects, particularly concerning his claim of reliance upon the judgment of the subordinates at the commission in connection with entering into the Manu-Mine contract. The trial judge fully impressed upon the jury in the charge and by the points for charge that it was essential to a conviction of Torrance that he be shown to have acted with criminal intent and with a corrupt motive. The discretionary powers of a commissioner, the presumption that the discretion was not abused, and the claim of reliance upon the subordinates to establish lack of corrupt motive were adequately covered. A misstatement of the evidence in the charge relative to the count in the misbehavior indictment charging obstruction of the investigation was corrected at the request of defense counsel. The charge of the court as to Torrance was not unfair, improper, or inadequate.

Defendants argue that the charge of the court as a whole was basically erroneous in that it did not clarify the issues for the jury and because it unduly emphasized and magnified the claims and evidence of the Commonwealth and minimized those of the defense. The trial judge must maintain impartiality; he should not in his charge overemphasize the claims and contentions of one side while minimizing the claims and contentions of

the other. *Com. v. Bartell,* supra, 184 Pa. Superior Ct 528, 546, 136 A. 2d 166. One of the primary objects of a charge is to clarify the issues so that the jury may properly comprehend the questions they are to decide. *Com. v. Milligan,* 172 Pa. Superior Ct. 607, 609, 94 A. 2d 64. We have examined the charge as a whole and find that it is not of the nature alleged by defendants. The charge including the points for charge covers approximately 200 pages in the printed record. Briefly the nature of the charge and matters covered were as follows: After introductory remarks the trial judge extensively discussed the question of credibility, the burden of proof upon the Commonwealth, the presumption of innocence, the nature of circumstantial evidence and the quantity and quality thereof necessary for conviction, the nature and legal requirements concerning conspiracy in general, and the individual indictments together with definitions of the crimes charged therein and references to the statutes applicable thereto. The nature and necessary elements of the crime of fraudulent pretense were explained. The discretionary powers of the commissioners were discussed; it was stressed to the jury that a corrupt and willful design was necessary to convict, and that an honest mistake of judgment or exercise of discretion was not sufficient. The nature and evidentiary weight of reputation evidence was given to the jury. The trial judge commented upon essential questions and issues to be considered by the jury and in so doing fairly presented the contentions of both sides. He gave a brief summary of the testimony of the witnesses, and in this respect it is to be noted that in discussing the Commonwealth witnesses the court's charge covered approxi-

mately ten pages as compared with approximately thirty-three pages devoted to the discussion of the defense witnesses. Interpolated in the recital of the testimony of the witnesses were questions raised by the testimony with a presentation of the contentions and interpretations of the Commonwealth and the defense as to that testimony. The evidence pertaining to several of the defendants with the contentions and interpretations of both sides were discussed. The exhibits were considered. The trial judge reiterated that a mistake of judgment on the part of the commissioners would not be sufficient to convict them of misbehavior in office. Time and again both sides of each question were raised and were discussed. The trial judge then finally considered the points for charge submitted by defendants, and the points affirmed cover approximately thirty-two printed pages. A review of the charge indicates that it was fair and complete. In fact much of the evidence of the Commonwealth was not stressed to the permissible limits. The contentions of defendants relative to the charge of the court as a whole are without merit.

IV. Conduct of the Trial

Defendants make a comprehensive attack upon the fairness of the entire proceedings from the investigating grand jury to the time of sentence. The asserted denial of due process must be tested by an appraisal of the totality of the facts in a given case. *Betts v. Brady*, 316 U. S. 455, 461, 462, 62 S. Ct. 1252, 86 L. Ed. 1595, 1601, 1602. In this portion of the argument defendants raise several of the specific items previously considered

such as the speech and remarks of the Governor,[17] the alleged intrusion upon the grand jury, the refusal of the bill of particulars and similar matters. To these they add others. We have discussed several of these specific matters separately in this opinion, and, giving further consideration thereto in the totality of the facts surrounding the prosecution, we come to no other conclusion than that due process was not violated. A reading of the entire record discloses no basic unfairness, bias, or prejudice in the admission or restriction of evidence, the examination and cross-examination of witnesses, or the attitude of the court toward defendants. The attitude of the trial judge in his rulings, in permitting the presentation of evidence, in the cross-examination of witnesses, as it can be gathered from the printed record, was equally fair to both sides. We point specifically to the wide latitude permitted defense counsel in cross-examining such witnesses as Lawler and Summers. We note that each of the counsel for the nine defendants on trial were given full and separate opportunity to cross-examine witnesses and present evidence. Defense counsel were also permitted to cross-examine the defendant Torrance and to elicit from him by leading questions much favorable evidence. Certainly in a trial of this nature and length there may be some errors of minor

17. Although the remarks of the Governor were said to have been widely disseminated in Dauphin County by television and radio, the effect of these remarks upon the trial jury has not been raised with particularity by the usual methods, such as a motion for change of venue, a challenge to the array, or by individual challenges for cause during selection of the petit jurors on voir dire.

consequence; we find no reversible error. That the jury reached its conclusion without bias or prejudice from the conduct of the trial is indicated in some degree by the fact that four of the defendants in this joint trial were acquitted. See *Com. v. Dixon*, supra, 179 Pa. Superior Ct. 1, 6, 115 A. 2d 811; *Com. v. McHugh*, supra, 187 Pa. Superior Ct. 568, 574, 145 A. 2d 896. The myriad minor items enumerated in the briefs of defendants in connection with the attack upon the over-all conduct of the proceedings neither singly nor collectively demonstrate any basic unfairness.

We have considered all contentions which defendants have presented in 1,400 pages of brief; and we have answered at length those which are in any way worthy of extended comment.

We conclude this opinion by referring to one other allegation of the defendants to the effect that the trial judge was biased and unfair. This is devoid of merit. As a matter of fact, under the circumstances he displayed unusual self-control and forbearance. There were lengthy and repetitious objections by fourteen defense counsel during the trial, and at its conclusion, in support of their motions, they assigned 941 reasons and 221 additional reasons incorporated by reference. In the record of 6,500 pages we find no justification for the criticisms by defendants of the conduct of the trial judge. It is our conclusion that defendants had a fair and impartial trial, and that there was no violation of due process of law.

The conviction of James F. Torrance on count 3 of the indictment charging him with misbehavior in office (No. 220, January Sessions, 1957) is reversed.

The judgment of sentence as to Paul J. McNeill on indictment charging conspiracy (No. 216, January Sessions, 1957) is reversed and said defendant discharged.

The judgments of sentence otherwise as to Thomas J. Evans, James F. Torrance, Charles W. Stickler, and Clayton A. Landsidle are affirmed, and it is ordered that said defendants appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with their sentences or any part thereof which had not been performed at the time the appeals were made a supersedeas.

GUNTHER, J., would grant the motions to quash the indictments and discharge the defendants.

OPINION BY WOODSIDE, J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority in the discharge of McNeill, the arrest of judgment on the one count against Torrance, the sustaining of the indictments and the refusal to arrest the judgments in the cases of Evans, Stickler and Landsidle.

I dissent in that I would arrest the judgment on the other charges against Torrance, and I would grant a new trial to Evans on all indictments, and to Stickler and Landsidle on the conspiracy indictment.

Arrest of Judgment

When the net is cast widely, as in a grand jury investigation, it is likely to envelop some who do not deserve the fate. Of the nine persons indicted in this case, the trial jury acquitted four and convicted five. We are

discharging one of the five. In my opinion, another of the appellants should be discharged because the evidence against him is insufficient to support the charges. In a trial as long and as involved as this one, it is difficult to keep each phase of the case in proper perspective.

Acknowledging the dangers of an over simplification by condensing over 5000 pages of testimony into a half dozen pages, I shall attempt to get at the heart of the offenses for which the appellants have been sentenced, and to examine the connection of one of them with the wrong done the Commonwealth. In doing so, we uncover an injustice which should be corrected.

Examining the evidence in the light most favorable to the Commonwealth, we find that on February 28, 1955, the Pennsylvania Turnpike Commission entered into a contract with Manu-Mine Research and Development Company.

Stickler, Landsidle, T. J. Evans and Torrance stand convicted of conspiracy to cheat and defraud the Commonwealth through this contract. The evidence establishes that Stickler (a nephew of Mrs. T. J. Evans) as president and Landsidle as general manager of Manu-Mine obtained this contract through false pretense, and cheated and defrauded the commission by virtue of it. They, along with Richard Evans, now deceased, son of defendant, T. J. Evans, shared handsomely in the approximate $4,000,000 profit which Manu-Mine made from the contract.

All five members of the commission voted to approve the contract. In retrospect, it seems as though all of them should have recognized that such action was

contrary to the best interests of the commission. It must be said in their defense, however, that the contract was recommended to them by the commission engineers, the consulting engineers, the commission counsel and other commission officers and employees who had negotiated, prepared or examined the contract and were familiar with the work to be done. Public officials must frequently rely upon their deputies and assistants. They cannot be held criminally responsible for the negligent or criminal acts of their deputies and assistants under circumstances such as this.

Of the five commissioners, Evans and Torrance alone were indicted, tried and convicted. Evans was chairman of the commission, and member with longest service, and, according to the Commonwealth's contention, the dominating influence on the commission. His relationship with Manu-Mine is apparent. Torrance had no connection, directly or indirectly, with the company.

To prove a criminal conspiracy the evidence must rise above mere suspicion or possibility of guilty collusion. *Commonwealth v. Burdell*, 380 Pa. 43, 49, 110 A. 2d 193 (1955).

A conspiracy involves an agreement. *Commonwealth v. Rosen*, 141 Pa. Superior Ct. 272, 279, 14 A. 2d 833 (1940). See Act of June 24, 1939, P. L. 872, §302, 18 PS §4302. The agreement need not be formed by express words, but may be inferred from concerted action. *Commonwealth v. Antico*, 146 Pa. Superior Ct. 293, 22 A. 2d 204 (1941); *Commonwealth v. Horvath*, 187 Pa. Superior Ct. 206, 144 A. 2d 489 (1958).

The indictment charges that the defendants "agreed among themselves to cheat and defraud . . ." Was Tor-

rance a party to this agreement? There is no direct evidence that he was. Only by inferring it from the circumstances can we find that he was a party to it. Guilt must be proved, not conjectured. There must be a reasonable inference of guilt based on facts and conditions proved. A conviction can not rest solely on suspicion or surmise. *Commonwealth v. Bausewine*, 354 Pa. 35, 41, 46 A. 2d 491 (1946).

What are the circumstances to which the Commonwealth and the majority of this Court point as establishing that Torrance was a part of this unlawful *agreement* to defraud the Commonwealth?

First, he "attended the January 1955 meeting at the Hotel Sterling in Wilkes-Barre." Evans, Torrance, Paul, Cleaves, and other officers and employes of the Turnpike were in Wilkes-Barre to examine the location of the Wyoming Interchange. The trip was publicized and newspaper men were present. It became relevant to this case only because while at the Sterling Hotel, Evans berated Cleaves for giving the newspapers a story that Manu-Mine would get a contract for slushing, and told Cleaves that he was supposed to see that "Manu-Mine didn't get into any problems like this." The conversation was evidence against Evans, but not against Torrance who was not involved in it and had no connection with it. There is nothing in the testimony from which it can be inferred that Torrance was in any way associated with anything improper in Wilkes-Barre.

Second, Torrance voted to approve the contract; but so did the other commissioners, whom the Commonwealth did not charge with any misconduct and who the Commonwealth admits were misled. If this was evidence

that Torrance was a party to the conspiracy, it was evidence that all the other commissioners were parties to the conspiracy, yet no person contends that they all were.

Third, they conclude that at the commission meeting of February 28, 1955, Torrance "urged" the adoption of the Manu-Mine contract, and said that Manu-Mine had an international reputation. Whether Manu-Mine had an international reputation or not is a collateral issue not worthy of mention here, except to note that it become a serious matter if the extent of Manu-Mine's reputation is to be the basis upon which a 70 year old public official with prior excellent reputation is to be imprisoned. But what did *Torrance* say about this contract? Secretary of Highways Lawler, explaining his vote for the contract, testified that "they" said, at the meeting of February 28, 1955, but never specified a single statement as having been made by Torrance.[1]

1. This was his testimony: "Q. At that meeting that you have just discussed as taking place on February 28, 1955, was there any discussion of a contract between the Pennsylvania Turnpike Commission and Manu-Mine Research and Development Company? A. There was. Q. Will you tell us who discussed the contract, what it consisted of, that is, the discussion? A. First *they* took up the importance of approving this contract because *they* were faced with the completion of the construction of the Northeastern Extension as far as the payment of interest on bonds was concerned. Q. Who was discussing it? A. The various members of the Commission: Mr. Torrance *or* Mr. Evans *and others*. Q. What happened, if anything? A. *They* said we were faced with paying interest; unless we could get the job completed. Therefore, it was to the best interest of the commission that we would approve this contract. Q. Was anything done about it? A. Yes—well, before the motion was made to approve the contract, it was pointed out to me as a member of

Present at the meeting were five commissioners, staff engineers, consulting engineers, commission counsel and others. Lawler's testimony was: "Q. Did other members talk to you about this contract? A. No sir." It cannot be inferred from Lawler's testimony that *Torrance* "urged" the adoption of the contract, and it is upon Lawler's testimony alone that the Commonwealth relies to establish that he did.

But suppose Torrance did urge the adoption of the contract. The investigating grand jury, or the trial jury, or this Court concluded that numerous people, in-

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that Commission, that the Manu-Mine Corporation has an international reputation. It was an outstanding firm, *they* impressed upon me that it was the only firm in existence at this time that was qualified to do that type of work. Mr. Burch: If the Court pleases, I ask that that answer be stricken on the basis that he was referring to people as 'they' without identifying who said what throughout this answer. Mr. Dowling: The next question is: Who made the statement? The Court: Unless the identity of 'they' is established we will have to sustain the objection. I understand the District Attorney to say that he proposes to establish the identity of 'they' by his next question. By Mr. Dowling: Q. Who made the statement that you have referred to? A. *I would say* Mr. Torrance, Mr. Evans, the chief construction engineer, Mr. Paul. Q. What was done pursuant to that discussion; what happened after this discussion, if anything? A. Well, after the discussion took place, it was moved by Mr. McSorley, and I don't know who seconded the motion that the contract be approved." (Emphasis ours) Furthermore, in cross-examination Lawler was asked "Who do you specifically remember participating in the discussion" to which he failed to answer responsively and the Court admonished "we direct you to answer the question as to who participated in the discussion—that is the heart of the question—if you remember." Lawler answered "I don't remember too much of a discussion."

cluding at least three of the commissioners, and five employes, among them engineers and a lawyer, made honest mistakes and were misled into approving the contract. There is every reason to conclude that Torrance, too, was misled. An official act of a public official is presumed to have been performed in accordance with the law and in good faith and with the proper motive. *Matson v. Margiotti,* 371 Pa. 188, 88 A. 2d 892 (1952); *Commonwealth v. McSorley,* 189 Pa. Superior Ct. 223, 150 A. 2d 570 (1959). How can an act itself presumed to have been done in good faith, be the basis of an inference that it was done with corrupt motive?

This brings us to the only evidence which, at first blush, throws suspicion upon Torrance. He accepted a gift from Stickler, and accepted work on his farm by Manu-Mine for which he did not pay. This conduct demands careful scrutiny.

On December 21, 1954, Torrance received from Stickler a gift certificate which he used on May 5, 1955, along with some of his own money to purchase a suit of clothes. The Commonwealth argues that from this it is to be inferred that he was a co-conspirator with Stickler, Landsidle and Evans in defrauding the commission of millions of dollars. Of course, he is not guilty if he did not conspire, whether the acceptance of the gift certificate for Christmas was ethical or not.

If the facts are consistent with the defendant's innocence, and can reasonably be explained on a theory other than that of guilt, the Commonwealth has not overcome the presumption of the defendant's innocence. *Commonwealth v. Bausewine,* supra, 354 Pa. 35, 40, 46 A. 2d 491 (1946).

It is evident, if one stops to think about it, that the logical inference to be drawn from Torrance's use of the gift certificate is that he was *not* involved in the conspiracy. If he was a party to a conspiracy to defraud the commission of *millions* of dollars, would he have accepted a suit of clothes as his share of the spoils of the conspiracy? If he was even suspicious that a conspiracy existed or that a fraud was contemplated, would he, in the light of his age, reputation and experience, have permitted the finger of suspicion to be pointed to him for the sake of a suit of clothes? The only reasonable inference which can be drawn from his acceptance of the gift certificate is that he knew nothing of the conspiracy and the fraud. It would be illogical to infer from his use of the certificate that he was a party to a conspiracy to defraud the commission of millions of dollars.[2]

Innocent acts create suspicion, when one becomes involved with unsuspected conspirators. Torrance is a farmer. He built a trench silo in an old quarry on his farm at a cost of approximately $500. While attending the Farm Show, he was discussing this with Stickler who had an exhibit at the show. Stickler asked Torrance to permit him to insert in the silo, then already built and ready to use, a type of wall which Manu-Mine hoped to market for silos. Torrance agreed, and Manu-Mine inserted the wall. Torrance invited photographers and newspaper men to his farm to see the work which had been done by Manu-Mine. They took pictures of the silo and described the new wall naming Manu-Mine as the

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2. One of the engineers who was acquitted received a television set as a Christmas present from Stickler in 1954.

builder. These pictures and news articles were published in national farm journals, newspapers and magazines. It cannot reasonably be inferred from this that Torrance agreed with Stickler to defraud the commission. If the work that Manu-Mine performed on Torrance's farm was related to the conspiracy, Torrance would not have called in the press to publicize his connection with a company whose officers were conspiring to defraud the commission of millions of dollars. Instead of being evidence of his complicity in the conspiracy, it is evident that he was not a party to it. If he had *any* suspicion that a conspiracy existed involving Manu-Mine, or that its officers were defrauding the commission, he would not have permitted its employes to work on his farm, let alone advertise the fact in national publications that they were there doing work on his property.

Torrance did not know that Richard Evans was an officer in Manu-Mine and held stock in the company. The Manu-Mine contract was recommended by the commission's engineers, and the consulting engineers. It was approved by the commission's lawyer. Payments under it were approved by the commission's comptroller. Commission inspectors approved the work. *Ten months after the February 28, 1955 contract was made, 14 different people were approving payments up to $900,000 each under the contract.* Of these Torrance alone has been indicted, convicted and sentenced. What possible ground can there be to conclude that Torrance was guilty of criminal conduct thereby, while the other 13 were not? The engineers, the inspectors, the lawyers, the comptrollers, the accountants, the new chairman who visited the scene of the work, the Secretary of Highways

who had a full time liaison employe at the commission office and a staff of engineers, lawyers and investigators at his command—for 10 months, none of them suspected a conspiracy or a fraud, or if any did, he said nothing about it. Because *Torrance* did nothing, it is to be inferred that he, out of all these, is alone criminally responsible for the fraud? The commission continued to operate under the contract, without any of the commissioners discovering the fraud for almost a year. If the fraud was so well designed that it misled the professional men who dealt with it, and on whom the commissioners relied, may we not infer it misled Torrance? It misled the businessmen on the commission. There is no justification in assuming that it did not mislead Torrance, also. *All the evidence indicates that he knew nothing of the conspiracy, and had no connection with the fraud.* It seems, of course, as we look at it today, that the commissioners and many of their employes should have been suspicious of the contract and should have detected the fraud sooner, but that is a fault of all the commissioners, and many of their employes, but not a criminal act of Torrance.

The majority has arrested the judgment of sentence, I think properly, on one of the indictments against Torrance. In my opinion the judgments of sentence against Torrance in the other two indictments should also be arrested.

If we look further, however, we shall find that the injustice to Torrance did not stop with his conviction, but was carried into his sentences. Even those who may disagree as to his innocence on these charges, must agree that any part which he *could* have had in the conspiracy

and fraud had to be *far less* active and *far less* rewarding than that of the other three who stand convicted of conspiracy. Torrance received a sentence of 2 to 4 years in jail; Landsidle received a sentence 1 year 10 months to 3 years 11 months; Evans received a flat sentence of 2 years and a consecutive sentence of 1 to 2 years, and Stickler received a flat sentence of 5 years. The Board of Parole can release Landsidle after 1 year and 10 months, Evans after 1 year and 1 day and Stickler after 1 day, but Torrance cannot be released from prison until after he has served 2 years. Thus Torrance faces the longest minimum sentence of any. The courts and the law look upon the maximum as "the" sentence, but those who serve them always look upon the time which the court says they *must* serve as "the" sentence.

There were a score or more of people who through culpability, negligence, or mistaken judgment permitted the fraud to be perpetrated. Under no possible view of the case could Torrance be classified as the most culpable or even the most negligent, but he will be the last of all of them permitted to seek a parole unless the Board of Pardons or the appellate courts decide otherwise.

I think the evidence was insufficient to sustain the conviction of Torrance, and I would discharge him.

New Trial

We all agree that it was error to have witnesses read statutes of the Commonwealth to the jury.[3] The majority excuses the error on the ground it was not prejudicial. Ordinarily, it would not be prejudicial for a wit-

3. Even the Commonwealth does not cite a single authority to support this action.

ness to read to the jury a statute, which the trial judge might properly read to it in his charge. But, the law relating to the Highway Department which was read to the jury by a witness in this case differs from the law relating to the Turnpike Commission which was applicable to the procedure here in question. I agree, therefore, with Judge WATKINS that it was not only glaring error to have the statute read by a witness but that doing so must have misled and confused the jury and was prejudicial to those defendants who were former Turnpike Commissioners or officers.

Furthermore, I agree with what Judge WATKINS said concerning the testimony which Paul gave before the grand jury. We all agree that Paul's grand jury testimony was not admissible against any of the appellants. The question here is whether the jury used this testimony to the prejudice of the appellants. We start with the presumption that it did not, because the trial judge told it not to. But, as I see it, this is a presumption which circumstances can rebut, and the use of this testimony throughout the proceedings by both *the trial court and the Commonwealth*, overcomes the presumption that *the jury* did not use it against the appellants.

Upon the acquittal of Paul this testimony was completely out of the case. It should not thereafter have been mentioned by court or counsel except to determine whether it sufficiently prejudiced the case of the other defendants to warrant granting them a new trial.

To emphasize how impossible it was for the jury to follow the court's instruction not to use this testimony, we need only note that the court itself in its opinion used over 700 words to review Paul's testimony while stating

the facts upon which it relied to sustain the conviction of the appellants. Even in the argument before this Court, the district attorney made extensive use of Paul's grand jury testimony to support the conviction of the appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to determine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt.

The evil of the use of this testimony against the appellants is that (1) they had no opportunity to cross-examine their accuser; (2) they had no opportunity to contradict in rebuttal what was said about them; (3) they had no opportunity to object to and prevent the use of hearsay and other incompetent testimony given by Paul to the grand jury. The unfairness of this is so glaring and so basic that it requires the granting of a new trial. At a new trial, Paul could be called as a Commonwealth witness and could testify to the facts contained in his testimony before the grand jury so far as they are relevant to the appellants' cases. The defendants would then have the right to cross-examine him and to rebut any untruthful testimony and to have the trial judge limit the testimony to that which is competent. This would give the appellants the fair trial to which they are entitled, and enable the Commonwealth to obtain the conviction of those whom the evidence would show to be guilty.

As I view it, Paul's testimony and the reading of the statutes prejudiced Evans to a *much* greater degree than it prejudiced Stickler and Landsidle. The statute

misled the jury as to the duties of the Turnpike Commission of which Evans was Chairman. Paul's testimony was directly concerned with excusing any misconduct on his part by placing the blame on Evans. I would, therefore, grant Evans a new trial on all charges, and Stickler and Landsidle a new trial on the conspiracy indictment.

DISSENTING OPINION BY WATKINS, J.:

I must respectfully dissent.

I have noted the great lengths to which Courts, and particularly appellate Courts, properly go to protect the rights of defendants, even though they be hardened, habitual criminals. It seems to me that, at least, the same concern should be exercised when the defendants happen to be men of prior sterling character who have enjoyed outstanding reputations in this Commonwealth. This should be especially true when the charges involved are grounded in politics, and by their very nature, invite the glare of publicity that tends to arouse adverse public opinion. We should always abhor trial by newspaper, radio and television.

The special Grand Jury was called upon a petition by the Attorney General of the Commonwealth, in which the District Attorney of Dauphin County had joined, on October 22, 1956. The purpose was to impartially investigate irregularities that were alleged to have taken place in the administration of the Pennsylvania Turnpike Commission as set forth in the petition.

We must remember that the Attorney General is the appointive officer of the Governor, serving at his pleasure, therefor subject to his supervision and control.

At the very time the hearings began and immediately thereafter, the Governor of the Commonwealth made certain public statements, excerpts of which are set forth in my concurring opinion in *Com. v. McSorley*, 189 Pa. Superior Ct. 223, 150 A. 2d 570 (1959), at page 240, and which I repeat again in a footnote to this opinion.[1] These

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1: Speech of October 22, 1956 made in television broadcast:

"You've seen the headlines—you'll see more. Investigation meanwhile goes on. The latest example of how the Republican leaders did business is the Turnpike scandal. A special Grand Jury is now investigating this development. We're proud of our Turnpike, justifiably so. It's one of the great highways of the world. And we have a right to be angry that anyone would use it to swindle. Yet this has been done. Certain people set out to steal $20,000,000 from it and they got $9,000,000 before we could stop them. Their front was a company called Manu-Mine Research and Development. Their officers were close relatives of the Chairman of the Republican Turnpike Commission—his son, his nephew and his niece by marriage. Together they owned almost all the stock in the Company. Now how did they go about getting this $9,000,000 from us.

"It was really very easy. Without competitive bidding they got a job digging holes in the ground and then filling them up again. Experts found these holes were useless and the prices charged for digging them and filling them were outrageous.

"As soon as we found out about this our Democratic Commissioners asked the Attorney General to investigate the matter. And Attorney General Cohen petitioned for a Grand Jury investigation. The investigation is now taking place.

"Now let's go back for a moment to examine exactly how Manu-Mine and its officers who knew the right Republican leaders, pulled off this swindle.

"Manu-Mine set up shop modestly with a nominal capital of $4,300 and as I told you before we stopped

statements by the Governor were given extensive and repeated coverage by the press, radio and television. The comments made in that concurring opinion concerning the prejudice created by the statements of the Governor as to the defendant McSorley, apply with greater force to the defendants herein because of the

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the deal; it had been paid over $9,000,000 by the Turnpike Commission. The secret of its success as we've seen was simple—Manu-Mine had an inside track with the Turnpike Commission and as a result it did 96.8% of its business with the Turnpike. Now, on most jobs like this one that Manu-Mine worked on, you have competitive bidding. Manu-Mine never had to bid against anybody, it never had to negotiate, it was employed as a consultant. As a consultant it recommended itself as contractor and then as an inspector of its work that it performed.

"I have here a report by Manu-Mine and the Turnpike Commission. This report cost us $117,000,000 and the gist of it was to propose a contract with — you guessed it—Manu-Mine. Now about that job. Experts say that it was unnecessary. It was made work and the price was jacked up sky-high. Now this isn't what I say or what anyone in my administration says—this is in the impartial report by the Pierce Management Company of Scranton.

"Here is the report and here is what it says:

"'In our calculations as to the reasonable unit price for drilling, we approached it from two view points. One, assumed contractor-controlled equipment. Two, assumed contractor-rented equipment. In both cases, basing the volume of drilling upon the original estimates, we allowed for overhead, a reasonable profit and the cost of casing.

With contractor-owned equipment we estimated a reasonable unit price to be $4.77 per linear foot. With rented equipment, we estimated a reasonable unit price to be $5.95 per linear foot.'

special reference made to them by the Governor. We think it is important enough to repeat what we said in *Com. v. McScrley*, supra, at page 240:

"An examination of the speeches delivered by the Governor on the eve of convening the Grand Jury and the following evening disclose a disturbing interferenee

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"Manu-Mine was paid $12.50 per linear foot. Now you know the story. As much of it as we know of it. You'll know more when the Grand Jury reports its finding. But the important thing to remember in this is no isolated case: that the Republican leaders have an unfortunate history of scandal that is now coming out after years of being covered up. We've only scratched the surface. We will not stop until we have made sure that the guilty have been found out and brought to justice. But more than that we will introduce a Legislative program in Harrisburg which will see to it that such dishonest and improper practices can never happen again and that's why I ask you to vote for a Democratic House of Representatives and a Democratic Senate in Harrisburg this fall so that we can pass the legislation needed to prevent dishonesty in your State Government . . ."

Statements of October 23, 1956 made in television broadcast:

Don Wear: "John Scotzin would you begin questioning Governor Leader tonight."

John Scotzin: "Governor, I caught you on a television program last night. I'm not sure what station it was—it may have been this one. It was a tailend of a political film in which you renewed all your charges about Manu-Mines of Reading fleecing the Turnpike Commission of more that $9,000,000 under Republican control. The film reminded me of a statement you made early last September when you sent Attorney General Cohen in the Dauphin County Court to ask for a Grand Jury investigation of these charges. At that time you said you were sorry to break these charges on the eve

with orderly judicial process. The speeches themselves indicate without any doubt the telling effect it had upon those who heard or saw the program. Excerpts from these speeches are set out in a footnote hereto.[1] The stations carrying these programs admittedly had a wide coverage of Harrisburg and Dauphin County and were

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of a political campaign and that you said this wasn't a matter concerning Republicans or Democrats, that all you wanted to do was get the truth. Obviously you're out to make political hay in a film like you had last night. Now how do you reconcile these two divergent statements?"

Governor Leader: "Well, I think the people, John, are entitled to know the facts. And when there is conspiracy or at least an alleged conspiracy in Pennsylvania, that some group full of wilful politicians are trying to lift from the Turnpike Commission more than $9,000,000, I think the people of this State have a right to know the facts. We're laying those facts before them and I think it's one of the things that—I guess almost everything, in spite of the fact that we sometimes try, I think almost everything that an official or governmental official does can be looked upon as politics and I believe that the people ought to know the facts in this case. There are a lot of people involved and we've laid the facts before them as ably as we can. But certainly there's a great deal more to this than I've laid before them in that television film and I think that the people of this state are going to be completely and thoroughly shocked at what happened. The moral tone and the ethical standards of this government as exemplified by what happened down there at the Turnpike Commission when they get the results of the Grand Jury that is now convened here in Dauphin County."

Don Weaf: "Go ahead John."

John Scotzin: "Governor, your statements at this instance, plus your film raised a question in my mind

heard and viewed by large numbers of residents of the area. The statements of the Governor were quoted repeatedly by the daily press, radio and television. It would be a tenuous assumption to state that members of the investigating Grand Jury or prospective members of the indicting Grand Jury and petit jury did not

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that in view of the fact that the Dauphin County Court turned over this matter to the Grand Jury yesterday. Is there any question of this case being pre-judged in your mind or influencing the Jurors who are considering it right now? They go home and listen to television Governor."

Governor Leader: "No, I don't think there is any danger."

John Scotzin: "No?"

Governor Leader: "Because the information that we put in there is already common knowledge, has already been published all over the State in newspapers. We haven't given any of the penetrating, the depth of information that are being presented to the Grand Jury. This is just superficial compared to the things that will be forthcoming, it seems to me, to the Grand Jury. We have been very cautious. There's a great body of information that we have at our finger-tips obviously or we would not have asked for this investigating Grand Jury here under, incidentally, a Republican District Attorney in Dauphin County. We would not have asked for it if we did not have a great body of information. What we have said so far we have merely scratched the surface but I do believe the people of this Commonwealth are entitled to the information and ought to know the facts."

John Scotzin: "But my point, Governor, is, when you keep renewing your charges they are bound to have some influence on these jurors who are analyzing this evidence. Let me give an illustration. What if I went out and interviewed a hundred people downtown and I published the results of what they thought about

hear or see these broadcasts. While the court below stated that it had no reason to believe that the Grand Jury disregarded the admonitions relative to political speeches, it can be safely said that the indicting Grand Jury or the trial jury did not have the benefit of the court's admonition. Coming, as it did, from the Governor himself, the speeches undoubtedly had a forceful

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this case. Say some of these decided Manu-Mines was guilty and some of these decided they were not guilty."

Governor Leader: "They wouldn't have the facts John. The facts that have been presented so far have been very limited. It's up to the Grand Jury to determine whether or not they are guilty but the superficial facts that we presented there are just the beginning. There's no doubt that we haven't backed them up with all the great, vast body of information that has been collected over the past six or nine months and that's the information that's now being presented to the Grand Jury. I have more faith in these members that they're going to judge the cases either on the basis of what they've read in your newspaper or what they've seen in my telecast."

John Scotzin: "One more question."

Don Wear: "Go ahead, John."

John Scotzin: "If I publish those facts that I found in the poll, I think that the Dauphin County Court would take a dim view of me and probably call me in and reprimand me for that on the basis that it may be prejudicial."

Governor Leader: "Well, I don't think—I don't think they're going to be influenced that easy. If I didn't believe that the great body of information we have was enough to—ah—it makes a few things that you said in your papers and that I said in that telecast look ah—small because we have only scratched the surface. It's all superficial. The real case is being presented down there, I'm sure is being presented ably and

and prejudicial effect which tainted the proceedings. And while we do not ascribe any evil motive to the Governor in making these speeches at this time, we do say that they had a judicially undesirable effect when consideration of fairness and due process are involved and when the unbiased deliberations of an investigating Grand Jury were of utmost importance.

"We believe that the irregularities referred to interfere with the substantial rights of the accused. Under the circumstances here presented, we cannot subscribe to the contention of the Commonwealth that these irregularities were cured by the action of the indicting Grand Jury because it had actual information before

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well by one of the former Assistant District Attorneys of the City of Philadelphia. There is great and vast body of information and research and investigation and facts backing up that case and I have great confidence in the way it's being presented and the ability of the Grand Jury to interpret it and to come to a logical decision."

John Scotzin: "Governor, conceivably the inquiring Grand Jury could determine that you have no case and throw it out and then nobody is going to be indicted?"

Governor Leader: "Well, yes it's conceivable."

John Scotzin: "The judge in his charge to the jury told them there should be no presumptions of the guilt or innocence of anybody in these proceedings."

Governor Leader: "I guess that's the way they all start and that's the way law—the tradition of our law and justice in this country is said. And I think it will be interesting to see the developments in that Grand Jury and also be interesting to watch the developments in the Delaware Joint Toll Bridge investigation where there was also a lot of money being spent, extravagances and where they had Miss TNT from Gay Paree on the payroll as a part time secretary."

it, which information was placed in the presentment. Nor is it much solace to state that the use of the minutes of the Grand Jury was improper. We cannot say that it was."

I think it is important to emphasize a question asked of the Governor by a reporter concerning his statements, as follows: Q. "Governor, your statements at this instance, plus your film raised a question in my mind that in view of the fact that the Dauphin County Court turned over this matter to the Grand Jury yesterday. Is there any question of this case being prejudged in your mind or influencing the jurors who are considering it right now? They go home and listen to television Governor." Even this reporter, without legal or judicial training, realized the danger created by the Governor's statements. His prejudgment of the guilt of all the defendants could not help but permeate the entire jury proceedings and make an unbiased investigation and unbiased deliberations impossible, because of the fact that he was the Governor and the Attorney General his appointee.

Because of all the irregularities in the Grand Jury proceedings, as discussed in detail in *Com. v. McSorley*, supra, I say again as regards these defendants: The motion to quash the presentment should have been granted under these circumstances. Failing so to do, the indictment should have fared no better. Cf. *Commonwealth v. Gross*, 172 Pa. Superior Ct. 85, 92 A. 2d 251 (1952). The factors here involved make out a clear case detrimental to the substantial rights of the defendants.

The majority, in order to create a foundation for the present conviction, has outlined the beginning and

development of Manu-Mine, and by this attempts to indicate it was a favorite of the Turnpike Commission. However, this is completely irrelevant to the issue since all previous contracts were executed and the work was done by Manu-Mine in an excellent manner and for very reasonable prices. This is admitted by the Commonwealth.

The contract entered into February 28, 1955, being the sole basis for these proceedings, that is, the support for the turnpike where it crossed the coal measures, was a matter of concern to the Turnpike Commission and its engineers for quite some time prior to the negotiation of the above contract, as the record clearly indicates; and was not something dreamed up on the spur of the moment as is indicated by the majority opinion. The Turnpike Commission has always adhered to the rule of maximum safety on all its turnpikes or their extensions. All of the engineers who testified agree that a slushing program to fill existing voids was necessary. The turnpike engineers and consulting engineers to the Turnpike Commission desired to achieve maximum safety. The mining engineers who expressed an opinion that 90% of the program as carried out was not necessary, adhered to the theory of taking a calculated risk on future subsidence on some areas on the Northeast extension. This indicates a difference of opinion among the engineers, and the election by the Commission to adhere to a standard they have followed for a long time would not thereby make them criminally responsible. The maximum safety rule as opposed to the calculated risk rule is practically demonstrated by the recommendation of Michael Baker & Co., successor to Greiner & Co., as consulting engineers to the Turn-

pike Commission, that flexible pavement rather than concrete be used on sections not flushed and having a propensity for subsidence, and the present unsafe condition for high speed travel of that portion paved with macadam corroborates the decision of the Commission for maximum safety.

I have lived in the anthracite mining region all my life and have personal knowledge of the problem of subsidence and how it affects the built-up areas and highways of the region. We have become accustomed to macadam highways that remind you of roller coasters and are always alerted to the danger of subsidence potholes. This we have come to accept as concomitant to the mining industry.

As a member of the Senate I served on the Anthracite Subsidence Commission of 1941, whose final report dated March 15, 1943, was made a part of this record. This report summarized by the Hon. George B. Stevenson, Chairman of the Commission, made this pertinent observation: "From actual experimental data acquired and from the collective thinking of competent mining engineers, we have concluded that flushing is the only practical approach to the solution of this problem. By flushing is meant the re-filling and packing of waste and other materials into the voids. Evidence appears to be conclusive that subsidence will not affect the surface if those voids are flushed which lay within a range of 300 feet below the surface."

As recently as June 19, 1959, a special report to Governor David L. Lawrence, in regard to surface subsidence at Forty-Fort, Pa., prepared by a committee of mine inspectors appointed by the Secretary of Mines,

stated that, "It is our opinion that subsidences such as occurred . . . in Forty-Fort will continue at periodic intervals and that the only solution, to at least minimize subsidence, is a long-range flushing program." This is in reference to the entire built-up area where mining has taken place. In our case, the Turnpike Commission was only concerned about the area over which the turnpike was constructed. We have in effect created a built-up area by constructing a pavement designed for high speed passenger and heavy vehicle travel so that the burden of support placed on the substructure is comparable to any so-called built-up area in the region. The report further said, "Practically the entire built-up section of Wyoming Valley is undermined to a greater or lesser degree. . . . eventually, subsidence will occur in practically all areas where mining has occurred."

The report referred to was submitted by Mine Inspectors Thomas M. Beaney, Andrew Wilson and Kenneth C. Lee, to the Honorable Joseph T. Kennedy, Secretary of Mines and Mineral Industries. Since the report was submitted to Governor Lawrence, it must be assumed that it was endorsed by the Secretary of Mines as the current official opinion of the Department of Mines, and further that such submission constituted an official approval of the contents.

This report is significant and tremendously important since Thomas M. Beaney was one of the material witnesses who testified for the Commonwealth in these cases. He testified that the work performed by Manu-Mine Research and Development Company in connection with drilling and flushing along the turnpike right-of-way through the Wyoming Valley was "for the most

part, with the exception of two or three areas, unnecessary and particularly all of the work done over robbed-out and completely mined areas" was unnecessary. He further testified that this was unnecessary "because, after a mine has been robbed out or a section of a mine has been robbed out, it caves. The voids are filled and overburden comes to rest, and there is no need for anything additional which may help. Nothing else will certainly help it." The same opinion was expressed and amplified by Daniel H. Connelly, Deputy Secretary of Mines, Ralph A. Lambert, Chief Engineer, Department of Mines, James H. Pierce, President of Pierce Management and Frantz Edgar Kudlich, Associate of James H. Pierce.

These witnesses testified that 95% of the work performed was unnecessary because it occurred in robbed-out areas where mining had been completely performed; and that it has been their experience, gained through practical experience in removal of pillars, that after approximately seven (7) years, equilibrium is gained again. The report of June 9, 1959 flatly refutes these opinions for it assigns as one possibility of subsidence the robbing which occurred in 1934, 25 years before the subsidence in Forty-Fort. If subsidence was possible in Forty-Fort after 25 years, then it is a reasonable conclusion that similar subsidences could occur under the turnpike right-of-way. So that the so-called "seven year rule" upon which the majority places reliance is theoretical, impractical rule of thumb without the benefit of scientific support.

This report clearly indicates that there is always a danger of subsidence regardless of the length of time that has elapsed after last mining or robbing. This risk

could not be assumed by the Turnpike Commission because of its standard of "maximum safety." They recommended a long range flushing program as the remedy for preventing subsidence in built-up area. Since many of the areas inspected and included in this report were inaccessible for physical examination so that inspection could only be made by an examination and review of mine maps, it necessarily must follow that they would be inaccessible for flushing purposes except by the method recommended by Manu-Mine Research and Development Company, which has been referred to as "blind-flushing".

As a practical matter, I question the wisdom of the construction of a modern high speed turnpike over mined-out areas without using the maximum safety rule that will require flushing the voids under the area. Certainly when we contemplate the disaster that might follow the failure of surface support on such a highway, it seems to make imperative the adoption of the rule. An example that gives a vivid picture of the result of highway subsidence is defendants' Exhibit No. 62, pages 403 to 407, of Vol. XXI, of the record. A fine example of this condition is found on State Highway Route 122, between the Borough of Ashland, Schuylkill County and the Borough of Mount Carmel, in Northumberland County, where a four-lane divided highway, despite continuous repair, has been broken up by mine subsidence so that permanent signs now appear on the highway warning motorists of a 25-mile speed limit because of mine subsidence. Such a situation certainly could not be tolerated on what Pennsylvania proudly calls the greatest all-weather highway in the world. So that the action of the Turnpike Commission

in following the maximum safety rule, instead of being criminal, was in fact, the exercise of wise and prudent judgment.

As to the inception of the contract in question, the record, without contradiction, indicates that all negotiations leading to the contract were conducted between Manu-Mine officials and the engineers of the Commission. (All engineers of the Commission who were indicted were acquitted by the jury). The Assistant Chief Engineer of the Turnpike Commission (John D. Paul, an acquitted defendant) requested Manu-Mine to submit cost estimates and proposals. The preliminary draft of the contract and the cost analysis were all submitted to John D. Paul. There is absolutely no evidence that any of the Commissioners suggested or dictated any of its terms, or saw a proposed contract prior to its approval.

The contract was thoroughly discussed at the meeting of February 28, 1955, by the turnpike engineers and the consulting engineers who recommended its approval. There is nothing to indicate that Mr. Evans or Mr. Torrance knew any more or less than the other commissioners present. Except for the vague and uncertain testimony of Mr. Lawler, who testified that "they" took up the importance of the contract and "they" were faced with a deadline for completion; "they" were faced with paying interest and that "he" would say by "they" he meant Torrance, Evans and Mr. Paul.

Under the original Act creating the Pennsylvania Turnpike Commission and its various amendments and supplements, including the Act of 1951, creating the Northeastern Extension of the Pennsylvania Turnpike,

the Turnpike Commission was an autonomous body. Under the various statutes which created it, it was not required to submit to competitive bidding any contract, regardless of its nature or character. Neither was it required to comply and conform to the various rules and regulations and statutory requirements which pertain to the highway department or any other branch or bureau of the State government.

The contract in question was not submitted to competitive bid. This was due to the fact that the engineering staff of the Turnpike Commission as well as the consulting engineers, at the meeting of February 28, 1955, when the contract was discussed, recommended its approval in its then present form. The legal staff of the Turnpike Commission subsequently approved the contract both as to substance and as to form. Thus no criminal motive could possibly be assigned to any of the members of the Turnpike Commission who voted approval of the contract, because it was not submitted to competitive bidding.

It was the practice of the Turnpike Commission to submit construction contracts to competitive bids. However, it was not an undeviating practice or custom, for the record shows that many contracts were let without competitive bids. One was for the construction of a bridge entailing an expenditure in the millions of dollars. Another was for slushing under the Northeastern extension, a contract which was let in 1955. Therefore, because this contract was not submitted to competitive bid does not and cannot place any criminal motive in the minds of any of the Turnpike Commissioners.

It was the custom of the Commission to submit to the Highway Department construction contracts for its approval. This was done through the offices of a liaison man, who at the time of this contract was Henry Klaus. However, engineering contracts were never competitively bid and neither were they submitted for approval to the Highway Department nor were they ever approved by that body. Mr. Klaus, who was the liaison man, when he saw the drilling work progressing on the Northeastern extension questioned the Chief Engineer, the Assistant Chief Engineer concerning this and he was advised that the contract was engineering in nature and did not require Highway Department approval.

However, the submission of construction contracts to the Department of Highways for its approval was also not an undeviating practice or custom, for the record is replete with numerous contracts which were neither submitted nor approved by the Highway Department, all of which were construction contracts. Regardless of the nature of the contract, whether it be engineering or construction, the fact is that the contract was approved by the full body of the Commission at a regular meeting on the recommendation of the engineering staff and upon the approval of the legal department and certainly these men were entitled to rely upon the technical advice of the men they had engaged to assist them. Certainly such conduct cannot be criminal in nature.

This contract, it is argued by the majority, was disguised as an engineering contract in order to avoid the requirements as to bidding, competitive bidding, and other features. Certainly no attempt was made to disguise its nature since it was discussed completely by

the engineering staff at the meeting, and its character and nature was known to all of the Commissioners and not just to the two who were indicted and convicted. It was the practice of the Commission to assign numbers to construction contracts, although engineering contracts bore no numbers. The contract in question was subsequently assigned a number by Mr. McNeill, the Finance Director of the Commission. There is no testimony in the record to show that any of the Commissioners or any of the defendants, other than McNeill, knew of the assignment of a number or the reason one had been assigned to it. Regardless of what may have motivated Mr. McNeill in assigning a numto this contract, that does not in and of itself raise it or lower it to the status of a construction contract. There is evidence on the record that many engineering contracts were assigned numbers and treated as construction contracts and only for the purpose of facilitating payment to the contractors involved. There is also testimony on the record that many construction contracts were not assigned numbers. Therefore, this cannot be taken as a hard and fast rule and no criminal motive can be ascribed to any of the Commissioners or any of the defendants for having failed to assign a number to the contract or for having subsequently assigned one. Certainly nothing criminal in character can be inferred from such conduct.

Likewise, the contract failed initially to require performance bonds. At the instance of the Finance Director on June 30, 1955, performance bonds were furnished. It was the custom of the Commission to have construction contracts carry performance bonds. The fact that none was initially required in this particular instance

was probably due to the recommendation of the consulting engineers and the engineering staff that it was an engineering contract and no one in the Commission felt that such a bond was necessary. The fact that one was subsequently supplied is not to be taken as evidence of any criminal intent or motive on the part of anyone. It was willingly given by Manu-Mine for the purpose of protecting the Turnpike Commission and protecting the materialmen and those who were performing services for Manu-Mine under that contract. That in itself would not raise the nature of the contract to be construction in nature rather than engineering.

The majority opinion devotes some time to the estimated drilling costs as submitted by Manu-Mine. The record however discloses that the estimated cost of drilling as submitted in May 1955 at $2,500,000 was to cover only two sections of the Turnpike, viz. 37-H and 37-I. The record also discloses that this estimate was prepared by the field engineering force and testified to by Mr. Guldin an engineer for the Turnpike Commission. (Vol. 4 page 867R.) This estimate was subsequently increased in September 1955 to $6,500,000 on all sections of the Turnpike 37-H to 37-L inclusive and in December of 1955 an increase to $8,500,000 total. These increases were likewise submitted by the field engineers and not by Manu-Mine. (Vol. 5 1107R.) If this is so and the record is undeniable in this respect then it cannot be said that any of these defendants engaged in a criminal act because the estimates were not submitted by either of them and neither is there any evidence that any of the defendants had anything to do with the preparation of the estimates as submitted by the field engineering force.

The majority opinion devotes considerable time to arguing that the price charged by Main-Mine for the drilling under this contract was grossly excessive. It is true that under the contract Main-Mine did make a large profit. However the cost analysis submitted by it to the Commission was based upon actual performance of a 20,000 foot hole which was used by Main-Mine under its exploratory contract of July [illegible] 1954. Even the expert witnesses of the Commonwealth conceded that the cost analysis submitted for the work performed under that contract and performed by the 20,000 foot hole accurate and proper as to unit rate and as to the cost of drilling the hole. During the negotiations leading to and culminating in the contract of October 31, 1955 it was contemplated that a 20,000 foot hole would be used for this drilling. However Main-Mine did succeed in securing the Bell [illegible] Manufacturer by the [illegible]. This [illegible] was contemplated and in the middle of February 1956 [illegible] a drilling [illegible] to [illegible] Main-Mine decided to use [illegible] Commission to [illegible] and that [illegible] with the [illegible]. There [illegible] of drilling with a Bell [illegible] this [illegible] of this particular [illegible]. That [illegible] may be that a Bell [illegible] in the [illegible] area for [illegible] and in [illegible] and [illegible] for the purpose of [illegible] the [illegible]. The [illegible] right of [illegible] [illegible] [illegible]

under the Northeast extension were drilled to three hundred and three hundred fifty feet. There was no experience with a B-58 drill as to the average that could be drilled per shift or per machine. Certainly, the record does not show that any of the defendants had such prior knowledge as to the performance of this drill. That it did perform well cannot be disputed. However, its performance should not and cannot be used for the purpose of ascribing a criminal motive to any of the defendants, since it was unknown at the time of the execution of the contract what the performance rate would be.

I concur with the majority in the discharge of the defendant Mr. McNeill. I concur wholeheartedly in the opinion of Judge WOODSIDE with regard to the defendant Mr. Torrance and feel that the opinion is equally applicable to Mr. Evans, another one of the defendants. In the case of Mr. Evans there is less evidence on the record which would establish guilt or criminal motive or other connection with any wrongdoing in these actions than any of the other defendants. What Judge WOODSIDE has said concerning the testimony of Mr. Lawler is equally applicable to Mr. Evans.

The only other two matters in the testimony which could remotely connect Mr. Evans with either a conspiracy or misbehavior in office is his relationship by marriage to the defendant Stickler. It should be noted that this relationship is rather remote, since Mr. Stickler was the nephew of Mr. Evans' wife. It should also be noted that this relationship was known to everyone in the Turnpike Commission. Mr. Evans made no attempt to conceal it nor to hide it, and when the contract was being negotiated the engineering department

and the legal department, as well as the Commissioners, excepting perhaps Mr. Lawler, knew of the relationship between them. The fact that Mr. Evans was Richard Evans' father can give rise to no criminal or corrupt motive on the part of the defendant. There is no testimony on the record that Mr. Evans, or any other defendant, knew of his son's stockholding interest in Manu-Mine. He was an emancipated son, who had his own home and was fifty years of age. It would be not an inference, but an assumption, for this Court, and the trial court, and the jury to say that Mr. Evans knew of his son's stockholding interest. We believe it would be highly conjectural to convict a defendant on testimony so weak as this.

The other incident referred to which might have some bearing on the guilt or innocence of Mr. Evans was the so-called Sterling Hotel incident. It arose on cross-examination of a defense witness, Mr. Luke, when he was asked by the Commonwealth's officers concerning a newspaper article to be read into evidence. It is clear that this testimony was hearsay. However, Luke denied and reiterated his denial on many occasions that he did tell the reporter that Manu-Mine was to receive the contract. He stated that the newspaper reporter magnified his very few remarks and denied that he made the remarks attributed to him. Mr. Evans, according to Dr. Cleaves, stated to the doctor that he was to have taken care that Manu-Mine did not get into trouble like this. However, is that statement sufficient to raise the inference that Mr. Evans was engaged in a criminal conspiracy or that he was corruptly motivated in negotiating or entering into the contract so as to amount to a misbehavior in office? Can it give rise to a fact that the contract was a fraud? I think not.

It is of extreme importance to note that Mr. Evans left the Turnpike Commission on June 30, 1955 at which time the estimated drilling cost under Manu-Mine's contract on 37-H and 37-I was $2,500,000 and the estimated cost for slushing on those two sections was $2,000,000, a total of $4,500,000. The increased estimates for drilling and for slushing were made in September and December of 1955, long after Mr. Evans had left the Turnpike Commission. If the program increased in magnitude and if false representations were made after Mr. Evans left the Turnpike Commission, certainly he cannot be held responsible. From the time of the execution of the contract until Mr. Evans left the Commission there were but three payments made to Manu-Mine under this contract and he voted to approve all three payments. He was not a party to subsequent approval, which were made by the Turnpike Commissioners who succeeded him. It is significant in both the conspiracy and misbehavior indictments that fourteen different people approved every payment received by Manu-Mine. None of them have been charged with conspiracy or with misbehavior in office. These people include engineers, inspectors, attorneys, finance people, accountants, as well as the new chairman of the Commission, who visited the scene of the work and the Secretary of Highways, who had a representative of his department assigned to the work.

The most amazing thing about those cases is that only Commissioners Mr. Evans and Mr. Torrance have been charged with wrongdoing. This, of course, must come from Governor Leader's statement that it was a Republican conspiracy and these two men are Republicans. The members of the Commission at the time of

the contract were Evans, Torrance, McSorley, Lawler and Watson. The contract was approved on February 28, 1955 on motion of McSorley, seconded by Watson. Can this Court conclude that men of this type, all of whom had prior public service in the Commonwealth, who had received their appointments from the Governor of Pennsylvania and had their appointments confirmed by the Senate of Pennsylvania, would be pulled literally by their respective noses in approving a contract involving millions of dollars at the behest of Mr. Evans and Mr. Torrance. To me this is unbelievable.

On December 12, 1955, on recommendation of Mr. Pepper, of the Commission's legal department, another contract was approved by the Commission for the Manu-Mine Company. The motion for the approval of this contract was made by Mr. Lawler and seconded by Mr. Torrance and passed unanimously by the Commission. This contract was for additional work on the Northeast extension. It was declined by the Manu-Mine company because the company did not have sufficient personnel to do the additional work. At that time Mr. Evans was no longer a member of the Commission as his term expired June 30, 1955. Evidently at that time Mr. Torrance was carrying the so-called conspiracy, solo.

Mr. Lawler's answer, on cross-examination, pinpoints the answer to all the questions raised by the conspiracy indictment:

"Q. Do you mean to tell us that you voted for and did vote for the awarding of the contract and the doing of the work without knowing what was involved? A. I depended upon the legal counsel, I depended upon our engineering staff, I depended upon our consulting engi-

neers. That, is why the Turnpike has retained these people to advise and instruct us Commissioners."

The votes of Mr. Torrance and Mr. Evans were motivated by the same reasoning. It is inconceivable that Mr. Lawler, a former Assistant Postmaster General for the United States, Mr. Watson, a former County Commissioner of Philadelphia, and Mr. McSorley, a wealthy and successful business man from Pittsburgh, would be dupes to a conspiracy involving millions of dollars.

It is strange that all of these men never suspected any fraud or any wrongdoing. It is strange, too, that these same people in December of 1955, to which Mr. Evans was not a party, voted unanimously to give Manu-Mine another contract. Mr. Evans had nothing to do with any payments made to Manu-Mine after his term on the Commission had expired. There is no justification then, in assuming that Mr. Evans was criminally motivated or corrupt in entering into this contract because of the size and the magnitude of the payments made to Manu-Mine by other Commissioners, long after he was not a member. In retrospect, it may seem rather odd and strange that this work would continue and arise to such proportions, but certainly, looking at it prospectively, can anyone say that Mr. Evans or any member of the Turnpike Commission or any member of the engineering staff, or the accountants, or the lawyers, too, had any conception of what it eventually might lead to. I would arrest judgment and discharge the defendants, Mr. Torrance and Mr. Evans.

I would grant a new trial to all of the defendants because, in my opinion, the many trial errors that were committed amounted to a denial of a fair trial and the

violation of the due process clause of the United States and Pennsylvania Constitutions.

The first trial error is the joint trial of obviously repugnant indictments. The false pretense indictment was repugnant to both the conspiracy and misbehavior in office indictments. The conspiracy indictment charges a criminal confederation on the part of the nine-named individuals to cheat and defraud the Turnpike Commission by entering into the contract of February 28, 1955. The misbehavior cases charge Mr. Evans and Mr. Torrance with corruptly negotiating and executing the contract and corruptly permitting payments to be made thereunder to Manu-Mine. The false pretense indictment, on the other hand, charges Stickler and Landsidle with making false representations to the Turnpike Commission, thereby obtaining the Commission's approval and the signatures of Mr. Evans and Mr. Torrance as officers, with criminal intent to cheat and defraud the Turnpike Commission.

The fact that the Commission may have been defrauded as a result of the representations cannot alter the indisputable fact that the deception was practiced upon the Turnpike Commissioners, and their engineering and legal staffs. If Mr. Evans and Mr. Torrance were induced to execute the contract by virtue of false representations made to the engineering staff or to them, it negatives any participation by them in a criminal conspiracy and contradicts any corrupt or illegal motive as charged in the misbehavior indictments.

If the conditions preceding and succeeding the execution of the contract were falsely represented by Stickler and Landsidle, how can it be said Mr. Evans

and Mr. Torrance or any of the Commission staff, were corruptly motivated, much less engaged in a criminal conspiracy? Clearly, the one offense is repugnant to the other two and therefore the testimony submitted in the false pretense case would not be material or relevant to the conspiracy and misbehavior indictments and did not show a general course of conduct all tending to the same general end. *Com. v. Dixon,* 179 Pa. Superior Ct. 1, 115 A. 2d 811 (1955); *Com. v. Novak,* 165 Pa. Superior Ct. 576, 69 A. 2d 186 (1949); *Com. v. McCord,* 116 Pa. Superior Ct. 480, 176 A. 834 (1935); *Com. v. Quinn,* 144 Pa. Superior Ct. 400, 19 A. 526 (1941).

The proof in the false pretenses case would not support the allegations set forth in the other two indictments. As a result, much that was admitted generally without cautionary or limiting instructions by the trial court, and some was conditionally admitted, and some limited to some defendants and not to others and some was admitted and made applicable to one or two indictments and restricted as to the others. One reading this record could not help but be confused by the limitations and restrictions placed thereon by the trial court. How then, can a lay jury, without the benefit of a written record, at the end of a lengthy and complicated trial, discriminate as to the various defendants and conflicting indictments and determine which testimony is applicable to each?

If a severance had been allowed, then much of the prejudicial testimony deemed admissible as to Stickler and Landsidle would not have been allowed. The fact that Manu-Mine had purchased a fur coat for the wife of Stickler, that it had paid for a house and for furnishing the same for Mr. Stickler, and for a trip to

Honolulu for Stickler and his family, was not material to any of the charges other than possibly the false pretense case. It has no bearing upon either the conspiracy or misbehavior charges, although admitted as applicable to the former. Its prejudicial effect on the jury, of course, cannot be measured but its intended effect was obvious—to create an atmosphere of nefarious activities on the part of one defendant which could have no evidentiary value as to the conspiracy or misbehavior charges.

In my opinion, the consolidation of these obviously repugnant indictments was prejudicial and constitutes reversible error.

Another glaring error, prejudicial in nature, admitted over defense objections, was the testimony of the chief counsel for the Pennsylvania Department of Highways, who read to the jury the applicable statute setting forth the required procedure pertaining to the Highway Department in advertising and awarding contracts for highway construction. When the testimony was offered the trial judge admitted it conditionally and not until all the evidence was offered was a ruling on its admissibility finally made. The Turnpike Commission was specifically exempt from the procedural requirements of the Act of 1945, P. L. 1242, Sec. 103, 36 PS 670-103. The submission of this testimony to the jury was tantamount to telling the jury that the Turnpike Commission was governed by the same legal and procedural requirements in awarding contracts as controlled the Highway Department.

What purpose could the testimony serve? Did it aid in any way to prove any of the charges in any of

the indictments? Where is its evidentiary value? This error was not innocuous and harmless as the majority opinion holds. It was substantial and prejudicial. Its purpose was to convey to the lay jury the implication that the Turnpike Commission was bound by the same law as the Highway Department. The trial court was in doubt as to its admissibility for it reserved its ruling until the very end of the trial. The testimony should have been immediately rejected. The trial court compounded its original error in refusing to charge as requested by the defendant that the Turnpike was not statutorily obliged to let any contract, regardless of its nature, only after competitive bidding. It was, therefore, only natural for a jury to conclude that the procedural requirements applicable to the Highway Department were applicable also to the Turnpike Commission. This was prejudicial error.

Another manifest prejudicial error was the reception of rebuttal testimony offered by the Commonwealth at the close of the defendants' case. Five former inspectors of Manu-Mine were permitted to testify, over objection, that they were engaged in a separate conspiracy with officials of Rogers Construction Company, a prime contractor with the Turnpike Commission, whereby the witnesses gave false weight slips to Rogers' employees for slushing material never received. Each of them stated that knowledge of this scheme was not communicated to the officials of Manu-Mine or any of the defendants. In fact, as a result of a private investigation conducted at the instance of Manu-Mine each of the witnesses denied, under oath, that they were engaged in any fraudulent scheme. Under the guise of attacking the credibility of the defendant Stickler and defense wit-

ness Luke, who stated that they knew of no wrongdoing or irregularities in the slushing program. The testimony was admitted. If the testimony was germane to any of the offenses being tried it was admissible only to attack the credibility of a witness and not to establish the fact of other collateral wrongs. The statement to be rebutted was the knowledge or lack of knowledge of Stickler and Luke as to the irregularities, and not the existence or nonexistence of the irregularities. Since each of the rebuttal witnesses admitted that the defendants were ignorant of the fraud, the testimony should have been excluded.

The prejudicial effect of this testimony is apparent because it related to an independent series of crimes, not germane to the cases on trial: *Com. v. Saulsbury*, 152 Pa. 554, 25 A. 610 (1893); *Shaffner v. The Commonwealth*, 72 Pa. 60 (1872). It was error to admit as substantive evidence of an existing conspiracy, separate and distinct acts and declarations of persons, not defendants, or shown in any way to have been connected with them, not made in their presence without the knowledge of any of them. *Wyatt v. U. S.*, 23 F. 2d 791; *Com. v. Duffy*, 49 Pa. Superior Ct. 344 (1912); *Com. v. Lynch*, 49 Pa. Superior Ct. 370 (1912). One of our most fundamental and prize principles in the administration of criminal law is that a distinct crime, except under special circumstances, cannot be given in evidence against the defendant tried for another crime because the person who has committed one offense is not proof of another. Its effect is to create prejudice in the minds of the jury.

The rebuttal testimony was not germane to any of the issues on trial and raised a collateral ladder to the

incalculable prejudice of the defendants. *Com. v. Petrillo*, 341 Pa. 209, 19 A. 2d 288 (1941); *Com. v. Burdell*, 380 Pa. 43, 110 A. 2d 193 (1955). In my opinion the admission of this highly prejudicial testimony into the record was a denial of due process and prevented, along with the other trial errors, the defendants from receiving a fair trial.[2]

The most glaring prejudicial error was the admission into evidence of the Grand Jury testimony of John D. Paul, former Assistant Chief Engineer of the Turnpike Commission and an acquitted defendant. It was admitted on the theory that it was a confession or an admission against the declarant. If the statement served that purpose, our review of the record fails to disclose any paragraph remotely resembling an admission of guilt on his part. It was rather an accusatory declaration, particularly against Mr. Evans, containing hearsay, conjecture and clear misstatement of facts. Had the Commonwealth attempted to offer the same

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2. As recently as April 16, 1959, this Court in *Com. v. Steinberg*, 189 Pa. Superior Ct. 381, at page 385, in an opinion by Judge HIRT, said: "A defendant on trial for crime, however guilty, may insist that the Commonwealth establish his guilt, by competent evidence in strict compliance with the law, unaffected by implication or innuendo flowing from collateral matters. . . . But when the court, over objection, permitted the Commonwealth in rebuttal to develop testimony on matters foreign to the issue trying, for the purpose of contradicting defendant Steinberg on an issue of his credibility, he clearly was prejudiced and the admission of this testimony over the appellant's objection was reversible error. A witness may be contradicted only on matters germane to the issue trying. Commonwealth v. Kettering, 180 Pa. Superior Ct. 247, 252, 119 A. 2d

testimony by other witnesses, most of it would have had to be excluded for failing to meet the standards of admissibility. However, under the confession theory, the Commonwealth accomplished by indirection what it could not have hoped to do directly.

If we permit the majority opinion in this respect to become the law in this State, then the Commonwealth can conduct criminal trials by ex parte proceedings or on depositions of witnesses without opportunity on the part of the accused to cross-examine. It is a clear violation of constitutional rights. The cases relied on in the majority opinion to substantiate its opinion are easily distinguished from the situation confronting us. In all of those cases there was *direct* testimony of the conspiracy or of the crime involved. In *Com. v. Berman*, 119 Pa. Superior Ct. 315, 181 A. 244 (1935), one

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580; Commonwealth v. Graham, 170 Pa. Superior Ct. 343, 347, 85 A. 2d 632; Commonwealth v. Petrillo, 341 Pa. 209, 225, 226, 19 A. 2d 288."

This is exactly the situation that exists in the instant case where testimony concerning an independent series of crimes not germane to the cases on trial was admitted for the alleged purpose of attacking the credibility of the defendants. In an even more recent case decided by this Court on July 3, 1959, *Com. v. Towber*, 190 Pa. Superior Ct. 93, in an opinion, also written by Judge HIRT, the *Steinberg* case was cited with approval and it was again held that a defendant cannot be contradicted by showing particular instances of misconduct disconnected with and collateral to the issue being tried. And in this case, at page 99, Judge HIRT said: "Nor was the admission of such evidence justified on the theory stated in the opinion of the lower court that: '. . . the truth of this matter was not in issue but only whether the defendant had made the same.'"

of the codefendants testified as a Commonwealth witness and implicated all of the defendants, including Berman (appellant) as well as Cummings, whose prior declarations were read as against him. There was other testimony supporting the conviction of Berman if Cummings' statement were entirely excluded. That is not the picture we have before us. Without the Grand Jury testimony of John D. Paul, the convictions cannot stand against any of the defendants, for the record does not establish the guilt of any of them beyond a reasonable doubt.

We do not believe that the cautionary instructions of the trial court limiting the Grand Jury testimony to John D. Paul to the declarant alone is sufficient to remove the obviously prejudicial character of his testimony. As we have previously stated, much of it contained hearsay, conjecture and plain misstatements of fact. It is full of leading questions asked by the Commonwealth amounting to actual testimony by the District Attorney and the Attorney General. In my opinion the statement should have been scanned and all hearsay, conjecture and misstatements have been eliminated, either by the Commonwealth or by the trial court when it became evident that it did not contain a confession or an admission.

Such has been the practice in many counties throughout the Commonwealth when a confession or admission against interest is offered on the part of one defendant. The names of other codefendants and material therein, which is applicable not to the defendant doing the confessing but only to others, has been eliminated by the Commonwealth before submitting it to the

jury. In some instances the court itself has stricken out the irrelevant and possibly prejudicial portions. See *Com. v. Epps*, 298 Pa. 377, 148 A. 523 (1930); *Fife, Jones & Stewart v. The Commonwealth*, 29 Pa. 429 (1857). In *Com. v. Novak*, supra; *Com. v. Fugmann*, 330 Pa. 4, 198 A. 99 (1938), and in *United States v. O'Malley*, 117 F. Supp. 895, the respective Courts refused to admit testimony of this character. The latter case is of particular importance for the facts very nearly parallel the instant case. In that case the Circuit Court granted a new trial because of the obvious prejudicial character of the statement of one of the defendants which was permitted to be read into evidence and which the Court limited by striking out portions thereof as being not applicable to the defendant who was convicted. It is a naive theory that prejudicial effects can be overcome by cautionary and sterilizing instructions to a jury. All practicing lawyers know this to be a fiction.

It is significant that despite the trial judge's instructions limiting this testimony to the declarant alone, that he still used portions of the Paul testimony in his charge to the jury against the other defendants. It is also significant to note that the lower court devotes considerable time in its opinion to the Paul testimony in order to substantiate the conviction of these defendants. It used John D. Paul's testimony to prove a conspiracy and to uphold the verdict, and this Court, in its majority opinion, is doing exactly the same thing. The obvious reason is because without this testimony there remains no set of circumstances from which a reasonable inference of guilt can arise. In the interest of justice it is my opinion that we should categorically

state and condemn such a practice by the Commonwealth, and not to permit testimony of this character to be introduced into evidence.

It is significant to note, too, that John D. Paul, the confessor, had more to do with the negotiation and the effectuation of the contract than any of the other defendants, and it is a strange coincidence that he should have been acquitted and those who the record discloses had little to do with either the negotiation or putting into effect the contract should have been convicted.

To summarize, in my opinion, I would discharge all the defendants because of the invalidity of the indictments; failing this, I would reverse the judgments of sentence and discharge Mr. McNeill, Mr. Evans and Mr. Torrance because of insufficiency of the evidence and award a new trial to Mr. Landsidle and Mr. Stickler; failing this, I would grant a new trial to all of the defendants on the ground that any one of the trial errors, discussed in this opinion, is sufficient to prejudice the constitutional rights of these defendants and prevent a fair trial, but that certainly the multitude of trial errors contained in this record taken cumulatively, together with the trial atmosphere, constitute a situation which amounts to a denial of due process and where the ends of justice demand a new trial.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Nos. 41 and 42 May Term, 1960

COMMONWEALTH
v.
THOMAS J. EVANS, JAMES F. TORRANCE, ET AL.,
Appellants

Per Curiam. FILED: April 21, 1960

The order and judgments of the Superior Court are affirmed on the opinion of President Judge Rhodes, reported at 190 Pa. Superior Ct. 179.

Mr. Justice Bell filed a concurring and dissenting opinion in which Mr. Justice B. R. Jones joins.

Concurring and Dissenting Opinion

BELL, J. FILED: April 21, 1960

A gigantic fraud was perpetrated on the Commonwealth of Pennsylvania in connection with the construction of a part of the Northeastern Extension of the Pennsylvania Turnpike, for which a number of people have been convicted and duly sentenced. Evans, a former Chairman of the Commission, and Torrance, a former member and former Secretary-Treasurer of the Commission, were convicted on separate indictments of misbehavior in office and of conspiracy with others to cheat and defraud the Pennsylvania Turnpike Commission. The Superior Court unanimously reversed the conviction

of Torrance on the charge of misbehavior in office, reversed the judgment of sentence of one Paul J. McNeill on the indictment charging conspiracy, and by a vote of four to three sustained a conviction of Evans, Torrance and two others on the conspiracy charge.

The crime of conspiracy for which these defendants were convicted "arose principally out of a contract dated February 28, 1955, between the commission and Manu-Mine." *Commonwealth v. Evans et al.*, 190 Pa. Superior Ct. 179, 195. The purpose of the contract was to provide surface support for the right-of-way of the Northeastern Extension of the Turnpike across the anthracite coal regions by the use of slushing material into mine voids underlying the roadway area, which land had been appropriated by the Commission for part of the Northeast Highway.

The basic questions involved in these appeals are two-fold: (1) Was the Commonwealth's evidence legally sufficient to prove beyond a reasonable doubt that *each* of these particular defendants was guilty of criminal conspiracy to perpetrate this fraud; and (2) Did the admission of Paul's testimony constitute reversible error?

The contract of February 28, 1955, made by the Commission and Manu-Mine Company was first negotiated and approved by the Turnpike Commission's engineers. The contract was then approved by the Commission's consulting engineers, then by counsel for the Commission, and finally by 14 other people representing the Commonwealth. All of these men, at least at first blush, appear to be as innocent or guilty as Torrance.

It was the theory of the Commonwealth that the defendants had conspired to defraud the Commission by obtaining this contract, and that the drilling and slushing program recommended by Manu-Mine was in fact 95% unnecessary, and that the price for drilling was unconscionably excessive and fraudulent, especially since Manu-Mine had represented that the contract cost per foot of drilling had been computed on the basis of the cost plus only 10 per cent profit.

The Pennsylvania Turnpike Commission was composed on February 28, 1955 of Evans, Chairman, Torrance, McSorley (succeeding Chairman) and Lawler (who shortly thereafter became Acting Chairman) and Watson. Manu-Mine Company or its officers and stockholders made a profit from this contract with the Commission variously estimated at from 4 to 10 million dollars. Evans' term expired June 30, 1955. All of the Commissioners (except Watson who was dead) denied that they had committed any fraud, denied any conspiracy or knowledge thereof, and denied any and all wrong-doing. Of the five Commissioners only Evans and Torrance were accused, or arrested, or indicted for conspiracy and fraud.

Torrance's Appeal

Lawler testified in behalf of the Commonwealth: "Q. Do you mean to tell us that you voted for and did vote for the awarding of the contract and the doing of the work without knowing what was involved? [Lawler had actually visited the scene of the work, and the Secretary of Highways had had a representative of his department assigned to the work, and 14 different people had approved *each* payment received by Manu-Mine.]

A. I depended upon the legal counsel, I depended upon our enginering staff, I depended upon our consulting engineers. That is why the Turnpike has retained these people to advise and instruct us Commissioners." This, as Torrance testified, is exactly the explanation of and the reason why he voted for the contract, as did Lawler, McSorley and Watson. Evans and McSorley were successful business men; the other members of the Commission were experienced in politics and had held public office. No one pretends and no one could successfully contend that McSorley and Lawler and Watson were dupes of Torrance.

Lawler gave as his explanation for his approval of the contract not only a proper and justifiable reason, but the only answer that an honest man could give. Public officials must frequently rely upon their deputies and assistants. These officials cannot be held criminally responsible for the negligence, or even for criminal acts of their deputies and assistants under circumstances such as these. We must never forget that the Commonwealth cannot prove a criminal case by suspicion or conjecture; it must prove it by evidence of facts and circumstances which are of such a nature and quality as to establish the guilt of each defendant beyond a reasonable doubt. *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A. 2d 820; *Commonwealth v. Sauders*, 390 Pa. 379, 134 A. 2d 890; *Commonwealth v. Kravitz*, . . . Pa. . . .

The contract was negotiated for the Commission by its engineer Paul. Torrance voted for the contract with Manu-Mine dated February 28, 1955, as did all the other members of the Commission, after it was approved, we repeat, by the Commission's engineers, by the Commis-

sion's consulting engineers, by counsel for the Commission, and by 14 other people representing the Commonwealth. There is absolutely no evidence that any of the Commissioners suggested or dictated any of its terms or even saw the proposed contract prior to the hearing at which it was approved.

What did Torrance do that was wrong or criminal? And what did he do that was different from what Lawler, McSorley and Watson did, who were never accused of wrongdoing or indicted for this crime? The only evidence of any substance whatsoever to convict Torrance was:

(1) That Manu-Mine Company and/or its officers and stockholders, *with which he had absolutely no connection directly or indirectly*, made a profit of $4 million dollars;

(2) That "On December 21, 1954 Torrance received from Stickler a Christmas gift certificate* which he used on May 5, 1955 to purchase a suit of clothes." Obviously this was not only unethical, but highly reprehensible. However, it doesn't prove, as the Commonwealth argues, that he was a co-conspirator with Evans, Stickler, Landsidle and others to defraud the Turnpike Commission of millions of dollars;

(3) That Torrance, who is a farmer, built a trench silo in an old quarry on his farm at a cost of approximately $500. Stickler saw him at the farm show and asked him to permit him to insert on the silo, *which was then already built and ready for use*, a new type of wall

*One of the engineers who was acquitted received a television set as a Christmas present from Stickler in 1954.

which Manu-Mine hoped to market for silos. Torrance, in the light of hindsight, foolishly accepted this offer, and Torrance invited photographers and newspaper men to his farm to see this wall which had been put up by Manu-Mine. Pictures and information about Torrance's silo wall and that Manu-Mine was the builder were published in National Farms Journals, newspapers and magazines throughout Pennsylvania.

The theory of the Commonwealth was that it could not possibly have been defrauded of 4 to 10 million dollars unless Evans and Torrance conspired with others to enable Manu-Mine or its officers and stockholders to illegally make a colossal fraudulent profit on this engineering project. If Torrance was a conspirator he was an absolutely indispensable *master* party to the conspiracy. If Torrance was going to enable other persons to make millions of dollars out of this contract, isn't it contrary to reason and all human experience that he would do so for a $200. Christmas present and a *publicly* exposed* un-

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*What is the distinction, where is the line drawn, between the acts and conduct of public officials and those having a proper legitimate interest in legislation or in matters coming before the public official or public body? What conduct and which acts are proper and which are improper? The Country was startled and shocked by newspaper revelation of large *secret* gifts to public officials during the Truman Administration. The Country was similarly shocked by the revelation of secret loans or gifts to a Presidential Assistant during the Eisenhower Administration. There are revelations every week of open and secret entertainment of National and State public officials, of yachting parties and plane trips, of pleas by Senators and Congressmen for television stations for a friendly constituent in their State, of public and private entertainment and television sets and gifts

necessary outer silo wall? The logical inference to be drawn from Torrance's use of the gift certificate is that he was *not* a member of the conspiracy. If he was even suspicious that a scheme or conspiracy existed to defraud the Commonwealth of millions of dollars, would he, in the light of his age and reputation, have joined the conspiracy *as one of its two indispensable master crooks*, or even permitted suspicion to be pointed at him for the sake of a suit of clothes? Isn't the only reasonable inference which can be drawn from his acceptance of the gift certificate, that he knew nothing of the conspiracy or its fraudulent scheme?

It is equally unreasonable and illogical to contend that Torrance's acceptance and publicizing of a new type of wall which Manu-Mine hoped to market for silos prove beyond a reasonable doubt that he conspired to swindle and defraud the Commonwealth of 4 to 10 million dollars, not for himself, but for the sole benefit of Manu-Mine, its officers and stockholders, with which he had no connection directly or indirectly. When a person intends or

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given to members of the Legislature of Pennsylvania when it adjourns—by persons or companies having business or legislation with or before such public officials or public bodies. With two exceptions not here relevant, none of these men were charged with crime or arrested or indicted for conspiracy or misdemeanor in office or for any crime. Where is the line between what is proper and improper and what is criminal? Isn't it high time, isn't it imperative in order to protect honest public officials and honest men having business with them that a code of ethics be forthwith adopted so that *everyone* may know—without fear of accusations or suspicions—what are his rights and limitations, what is honest and dishonest, proper and improper, legitimate and criminal!

plans to commit a crime, he goes about it *clandestinely and attempts to hide from the public both his identity and every one of his acts which could be linked to the crime.* Certainly he does not publicize to the world, as Torrance did, his silo wall and that it was built by and can be bought from Manu-Mines. Instead of being evidence in behalf of the Commonwealth to prove Torrance guilty of fraud, it is more reasonable and logical to say that it demonstrates that he was *not* a party to the crime. Yet these were the two rocks on which the Commonwealth built its entire case. This was the evidence which the Commonwealth contends is legally sufficient to sustain the conviction *beyond a reasonable doubt* of a 70 year old man who all his life has had an outstanding reputation for honesty.

In the light of prevailing practices in Harrisburg and Washington, some of which I consider reprehensible, but none of which are considered criminal, and especially in view of the trifling amount of these gifts in comparison with the multi-million dollar profits which Torrance allegedly fraudulently enabled Manu-Mine to obtain, will the law allow the Commonwealth to say that it proved beyond a reasonable doubt that one of the two alleged *master* crooks was guilty of this multi-million dollar fraudulent swindle because he took as his share of the 4 million dollar loot a $200 Christmas gift certificate and a publicly advertised unnecessary wall on his $500 silo? How unrealistic, and with all due deference to others, how ridiculous can we be?

In *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A. 2d 820, the Court said (pages 426, 427): ". . . it is clearly settled that a man may be convicted on circumstantial

evidence alone, provided his guilt is proved beyond a reasonable doubt: [citing cases] . . .' . . . The circumstantial evidence in this case [i.e. the facts and circumstances proved in *Commonwealth v. Bausewine*, 354 Pa. 35, 46 A. 2d 491] is not such "as reasonably and naturally to justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt": [citing cases]."

In *Commonwealth v. Bausewine*, supra, this Court, in reversing a conviction for bribery and discharging the defendant, said (pages 40-41): "The testimony adduced by the Commonwealth is weak and inconclusive. . . .

"The burden devolved upon the Commonwealth to overcome the presumption of defendant's innocence and to establish, beyond a reasonable doubt the fact that he had accepted money to influence him as a police officer to act contrary to known rules of honestly and integrity. While the mere fact that the evidence adduced is wholly circumstantial is not fatal to the Commonwealth's case (Commonwealth v. DePetro, 350 Pa. 567, 577, 39 A. 2d 838), yet it must be remembered that guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony. The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, not . . . as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt. The circumstantial evidence in this case is not such as 'reasonably and naturally to

justify an inference of the guilt of the accused, . . . and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt': Commonwealth v. Marino, 142 Pa. Superior Ct. 327, 16 A. 2d 314; Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95; Commonwealth v. Holt, 350 Pa. 375, 387."

In *Commonwealth v. Rogozinski,* 387 Pa. 399, 128 A. 2d 28, the Court said (page 402):

" 'The requirement of the law is that in order to warrant a conviction the facts and circumstances proved must be of such character as to . . . [prove] the guilt of the accuser beyond any reasonable doubt . . . and that doubt is for the jury unless the evidence "be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances." ': Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95."

I agree with three Judges of the Superior Court that the Commonwealth's evidence was legally insufficient to prove Torrance guilty beyond a reasonable doubt of the crime of fraudulent conspiracy of which he was convicted. *I am convinced* that the judgment against Torrance should be arrested and should be discharged!

Evans' Appeal

I turn now to Evans' appeal. The Commonwealth's evidence was more than adequate if believed, as it was by the jury, to convict Evans. However, all the Judges of the Superior Court agreed, and I certainly agree, that a number of trial errors were committed during this trial. The Superior Court, by a vote of 4 to 3, disagreed as to

whether the errors were harmless or were so prejudicial as to be reversible errors. I find it necessary to discuss only one of them.*

I believe that realistically and practically an errorless trial would have been impossible, considering the nature and length of this trial, which began June 4 and ended July 25, 1957. The testimony totaled over 5,000 pages.

In *Commonwealth v. Fugmann*, 330 Pa. 4, 198 A. 99, Chief JUSTICE MAXEY, speaking for a unanimous Court, said (page 18):

"There is seldom any criminal or civil trial of any magnitude or duration into the record of which some irrelevant, incompetent and immaterial testimony does not 'creep' and has been subsequently 'stricken out' and the jury instructed to 'disregard it.' To grant new trials whenever such a thing occurred would mean an interminable and intolerable succession of new trials. There is no standard by which the effect of such formally 'sterilized'

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* Some of the questions in these appeals bothered me, as they obviously bothered the Superior Court. President Judge Rhodes wrote an exhaustive able opinion of 77 pages. Judge Woodside wrote an able concurring and dissenting opinion, in which he analyzed with more particularity several of the important questions raised by Torrance and Evans. Judge Watkins likewise wrote an able opinion, especially in connection with the baffling problems of flushing and subsidence in the coal regions, with which he is an experienced expert. Judge Watkins also devoted a considerable part of his elaborate 31 page opinion to the reasons for the indictment and conviction of Evans and Torrance, which he charged were solely political. I deem it unnecessary to consider these points.

testimony on the minds of the jury can be gauged. In theory the law intends that no testimony shall have any but a logical effect on jurors' minds; in practice, nearly all testimony has both a logical and a psychological effect in varying ratios. The law intends that no witness's testimony shall make any appeal except to the jurors' reasoning faculties; in actual practice, a witness's testimony sometimes makes more of an appeal to the emotions than to the reason."

It is, I believe, humanly impossible to set up a test or standard which can demonstrate definitely or with mathematical certainty whether a jury was able to eliminate from its mind and decision, certain incompetent evidence or whether that evidence was of such a nature and character that notwithstanding the instructions or admonitions of the trial Judge, it remained in and influenced and prejudiced their minds. The best definition of a harmless error is that given by Justice (former Chief Justice) Horace STERN, in *Commonwealth v. Neill,* 362 Pa. 507, 67 A. 2d 276, where, in discussing the effect of an improper suggestion made by the District Attorney to the effect that defendant had attempted to commit an act of sexual perversion, the Court said (page 517): ". . . the question itself, irrespective of its form, was highly reprehensible, because there was nothing whatever in the testimony to indicate that any such offense had been committed or attempted. However, the learned trial Judge, in vigorous language, admonished the jury to expunge from their minds what had thus been intimated, and cautioned them to give no credence to it but to exclude it wholly from their consideration. The test in such case is *whether the jury may have been so strongly influenced* by the improper introduction of such

an insinuation *that the effect of it on their minds could not likely be dispelled by the court's subsequent instruction to disregard it*: Commonwealth v. Fugmann, 330 Pa. 4, 17-20, 198 A. 99, 106, 107. In the present instance we do not believe that the jury could have been so influenced, for they must immediately have realized that there was no basis for the District Attorney's 'suggestion'. Be this as it may, it is safe to conclude that, in view of the established, even admitted, atrocity of the crime, this incident was not a contributing factor in the determination of the penalty."

The best that any Judge can do is to conscientiously apply this test in each case where the question of harmless or prejudicial and reversible error is raised.

John D. Paul was indicted as one of the conspirators. Paul's testimony before the Grand Jury (which was so lengthy that it covered approximately 300 pages) was admitted in this trial and was read in full to the jury under the theory that it was a confession or a so-called admission against interest and was therefore admissible against him. It was certainly not a confession and it is likewise questionable whether it rose to the height of an admission against interest. Paul was acquitted. The vice of Paul's Grand Jury testimony was two-fold: (1) it contained highly incompetent testimony, hearsay testimony, and his *guesses*, inferences, conjectures and conclusions, and (2) it was *highly prejudicial to Evans*. Paul's testimony was in reality an attempt to incriminate the other defendants, particularly Evans. In order to determine how highly prejudicial to Evans some of Paul's *grossly* incompetent testimony was, I shall quote a few excerpts therefrom:

"Q. Have you given any consideration to the timeliness of August 25th, 1953, and September 1953, in the light of events that have later occurred? A. Frankly, no, as of this minute I had not. Q. Does it seem to you *as of this minute* that there is any significance to attach to those periods of time? A. There might have been. Q. *What might have been?* A. It might have been in somebody's mind; certainly not mine. Q. Well, what might have been in someone's minds that you can think of at this point that *might incite your curiosity?* A. My curiosity now has been developed somewhat by the coincidence, we will call it, of those two dates, insofar as perhaps later activities of Manu-Mine *might have been concerned in somebody's mind.* Q. *What mind are we thinking of* at this moment, sir, that is particularly attractive to your thinking at this moment; what mind would you be attracted to? A. *The only mind* that I would know *that might be at all interested* in Manu-Mine *would be Mr. Evans*, Chairman of the Commission. . . . Q. What would that have possibly entailed if you had given such consideration to those thoughts that would have come through your mind? A. Well, undoubtedly I would have been told that, maybe rather broadly, that it was none of my business, or something like that. Q. In order to convey it to the Grand Jury, we have to do it through what you were thinking. We have to convey it by words, and you have done it very descriptively. Do you think this was a foregone conclusion that Mr. Stickler was going to operate in this field and all you could do was go along with it? A. Well, to what extent Mr. Stickler was received, I think that that was a pretty foregone conclusion that he would get the job, . . . A. . . . and someone

besides Mr. Evans, I believe it was Mr. Torrance, and the question was: 'Don't you think we ought to do something about the Department of Mines on this case?' Q. Who made that statement, sir? A. I believe it was Mr. Torrance. . . . Q. What was Mr. Evans' reaction to Mr. Torrance's inquiry? A. 'No, we don't want that.' . . . Q. Mr. Evans did not want the Department of Mines in this matter, did he? A. No. Q. That was pretty definitely understood by you, was it? A. *I had that impression.* . . . Q. *Why did you conclude* that Mr. Evans didn't want the Department of Mines involved in this? A. Well, actually I don't think I examined *his motive* for thinking so at the time. Q. *Have you since that time examined it?* A. Oh, I thought about it a great deal in the past six or eight months. Q. *What has been the conclusion that your thinking has resolved itself into, sir?* A. Simply this: That the Department of Mines presumably has in its possession or in its record a full supply of maps of all mining work; and that information should be available alone. Now, the question of whether to employ Department of Mines personnel, whether that could be done or not, is quite another story, or was in my mind then. Since then it has, of course, been done, and we employed—I mean the Commission paid for their assisting personnel. So that it no doubt would have been just as possible earlier as it was later. Q. Let's give it a little more validity, sir, to the conclusion, I believe. Isn't this a fact: If the Department of Mines had been consulted it would have done just what it has already done and there wouldn't be any Manu-Mine contract? A. I believe that is a fair statement. Q. In other words, Manu-Mine couldn't have gone into a contract that more

than $10 million had been paid on if the Department of Mines had been consulted, *isn't that a fair conclusion?* A. *I think so.* Q. So, therefore, Mr. Evans didn't want the Department of Mines involved in this matter, did he? A. That was clear enough to me. Q. So if the Department of Mines had been involved, Mr. Evans' nephew would not have been involved, is that right? A. I think that is true too. . . . Q. We want to know why, sir. Do you have a reason to ascribe for that? A. The only reason I can ascribe to that is that Mr. Evans might have thought that I would get the contract set up perhaps sooner than Mr. Stone, or something like that; *maybe he had a special purpose in the back of his mind at the time.* Q. *What could that have been?* A. Well, probably another purpose which could have been in the back of his mind was that I was the man who would, say, be duped, put it that way, or at least, carry out his order to his satisfaction. Q. In other words, or have you now concluded that Mr. Evans did think that he might more easily have you handle the contract of February 28, 1955, than Mr. Roger Stone? A. I would conclude that, yes, sir. Q. There is a reason, isn't there, sir, for most every bit of human conduct? A. Correct. Q. You have ascribed that as a reason, and you have had an opportunity to reflect on it, have you not, sir? A. Yes, sir. Q. That is your considered opinion this afternoon, isn't it? A. Yes, sir, I think so. . . . Q. Did you conclude at that time that Mr. Evans did not want any other drillers in there because there would have been a competitive bidding on that amount of work which would have contrasted to the $12.50 per foot that Manu-Mine was making? A. *At this juncture I would say yes.* Q. Isn't that the

reason why no further drillers were brought into that area? Didn't Mr. Evans make it pretty clear to you if any other drillers was brought in there there might be a question concerning the $12.50 per foot? A. I would gather that much very clearly, that if anything like competitive bidding was accomplished that that figure might be reduced. That is my opinion; yes, sir. Q. Therefore, you would conclude from that that Mr. Evans gave the instruction to go ahead and drill, and drill regardless of the cost, isn't that right? A. Yes, sir. . . . Q. Other than that, you felt the influence that Mr. Evans exerted was a primary motive behind this contract for renegotiation? A. Yes, there is no doubt about that. Q. And from decision by Mr. Evans you had no redress? Did he have other Commissioners under his thumb, in your opinion, as he had the department heads? A. Mr. Evans as I have said dominated the Commission. He got what he wanted and that refers to the other members of the Commission as well, by one method or another. Somehow whatever he wanted to do the Commission agreed to do."

Some of the questions propounded to Paul by the District Attorney were so outrageous that it is astonishing that such an able lawyer would ask a witness for his guesses, inferences, conjectures and conclusions, especially in the light of hindsight. Although the Commonwealth contends otherwise, it is clear and undisputable (see infra) that it placed great reliance upon this testimony of Paul to forge a necessary link in the conviction of Torrance and particularly Evans.

The trial Judge wisely and fairly told the jury that this testimony was admissible only against Paul, and should not be considered against the other defendants.

I have noted the great lengths to which this Court, and particularly the Supreme Court of the United States, goes to protect the basic rights of defendants to a fair trial in accordance with our Constitution, even though the defendants are hardened, dangerous criminals with a long prior record of felony convictions. It seems to me that at least the same concern should be exercised and the same protection should be afforded to men who have up to now enjoyed splendid reputations in this Commonwealth, as is given to hardened criminals. On the basis of these decisions the admission of Paul's Grand Jury testimony— which contains so much that was outrageously incompetent and so much that was highly prejudicial to Evans—constituted incurable reversible error.

Moreover, the difficulty of actually separating it is strikingly apparent from the recent "split-verdict" Act of December 1, 1959, P.L. ... Even more importantly, the difficulty of separating and dispelling *these incriminatory terribly damaging guesses and inferences and conclusions against Evans* is aptly expressed and pinpointed by the exceedingly able concurring and dissenting opinion of Judge WOODSIDE: "To emphasize how impossible it was for the jury to follow the Court's instruction not to use this [Paul's] testimony, we need only note that the court itself in its opinion used over 700 words to review Paul's testimony while stating the facts upon which it relied to sustain the conviction of the appellants. Even in the argument before this Court, the District Attorney made extensive use of Paul's Grand Jury testimony to support the conviction of the appellants, particularly Evans. If the judge and the district attorney continue to use Paul's testimony to deter-

mine and argue the guilt of the appellants, it is conclusive proof to me that Paul's testimony could not possibly have been ignored by the jury in passing upon the appellants' guilt.

"The evil of the use of this testimony against the appellants is that (1) they had no opportunity to cross-examine their accuser; (2) they had no opportunity to contradict in rebuttal what was said about them; (3) *they had no opportunity to object to and prevent the use of hearsay and other incompetent testimony* given by Paul to the grand jury. *The unfairness of this is so glaring and so basic that it requires the granting of a new trial.* At a new trial, Paul could be called as a Commonwealth witness and could testify to the *facts* contained in his testimony before the grand jury *so far as they are relevant* to the appellants' cases. The defendants would then have the right to cross-examine him and to rebut any untruthful testimony and to have the trial judge limit the testimony to that which is competent. This would give the appellants the fair trial to which they are entitled, and enable the Commonwealth to obtain the conviction of those whom the evidence would show to be guilty."

I wholeheartedly agree with the above statement by Judge WOODSIDE. While it is very unfortunate that a case of this magnitude has to be retried, in my judgment, the safeguarding of the law and the preservation of the Constitutional guarantees of liberty and due process are paramount, and Justice demands that a new trial be granted Evans.

I would therefore reverse the judgment and sentence against Evans and direct, in his case, a new trial.

Paul's references to Stickler and Landsidle were very different in kind and degrees from his incriminating and glaringly incompetent references to Evans and constituted, at most, harmless errors. I concur in the Court's opinion with respect to the appeals of Stickler and of Landsidle.

Mr. Justice Benjamin R. Jones joins in this Concurring and Dissenting Opinion.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 855

COMMONWEALTH EX REL. JAMES F. TORRANCE,

Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Brief for Respondent:	
Statement of the Case	1
(a) The Proceedings Below	1
(b) The Evidence Sustaining Petitioner's Convictions	3
Argument	10
Conclusion	11

TABLE OF CITATIONS

Cases:

Com. v. Evans et al., 72 Dauph. 31 (1958)	1
190 Pa. Super. Ct. 179 (1959)	2
399 Pa. 387 (1960)	2
364 U.S. 899 (1960)	2
364 U.S. 939 (1961)	2
Garner v. Louisiana, 368 U.S. 157 (1961)	10
Thompson v. City of Louisville, 362 U.S. 199 (1960)	3, 10
United States ex rel. Williams v. Lavallee, 276 F. 2d 645 (2d Cir. 1960), appeal dismissed, 362 U.S. 637	11

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Commonwealth ex rel. James F. Torrance,
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v.

Joseph Salzinger, Warden of the Dauphin County Prison,
Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

(a) The Proceedings Below

Petitioner was convicted in the Court of Quarter Sessions of Dauphin County, Pennsylvania, on indictments charging him with conspiracy to defraud the Pennsylvania Turnpike Commission, of which he had been a member and secretary-treasurer, and misbehaviour in office as a member thereof. The convictions were affirmed by the Dauphin County Court, sitting en banc, *Com. v. Evans et al.*, 72 Dauph. 31 (1958). The convictions were affirmed by the Superior Court of Pennsylvania, except for one count

of the misbehaviour-indictment, 190 Pa. Superior Ct. 179 (1959). The decision of the Superior Court was affirmed by the Supreme Court of Pennsylvania, 399 Pa. 387 (1960). This Court denied certiorari, 364 U.S. 899 (1960), and also denied a petition for rehearing, 364 U.S. 939 (1961).

The petitioner's co-defendants have not attacked their convictions by federal process and are presently serving their sentences.

In none of these proceedings did petitioner assert that he had been denied due process because the evidence sustaining his conviction was only "scanty", or that it did not "in reason support the jury's finding of his guilt", the language used in petitioner's statement of the Question Presented here.

After this Court denied certiorari on petitioner's direct appeal, petitioner sought a writ of habeas corpus in the United States district court for the middle district of Pennsylvania. The written petition raised only two issues, namely, pretrial publicity said to have deprived petitioner of a fair trial, and the admission in evidence of the statement of a co-defendant, Paul, under instructions limiting the evidence to that co-defendant. Petitioner has now abandoned the issue of pretrial publicity. The Paul statement is the subject of a separate petition for certiorari, now pending in this Court.

The issue raised here, namely, the quantum of evidence in the record sustaining petitioner's convictions, was not brought into the case as a constitutional issue, until the oral argument before Judge Follmer in the District Court.

As to that issue the Court of Appeals held that petitioner, not having raised the issue as a constitutional ques-

tion in the state courts, had failed to exhaust his state remedies and that "proper deference to Pennsylvania dictates that the state courts be asked to consider the application of the rulings of the *Thompson* and *Garner* cases to the facts of the present case before we do so". The Court of Appeals did decide that there was no merit to petitioner's other grounds, namely, the pretrial publicity and admission of the Paul statement, and, accordingly, affirmed the judgment of the district court denying the petition for a writ of habeas corpus.

Following the decision of the Court of Appeals, petitioner applied for a writ of habeas corpus, on the issue of the quantum of evidence sustaining his convictions, in the Supreme Court of Pennsylvania, which took original jurisdiction of the application and held a hearing thereon. The Supreme Court of Pennsylvania, in a unanimous decision, including the two Justices (Bell and Jones) who had dissented from the prior decision of the court sustaining petitioner's convictions on direct appeal, denied the writ of habeas corpus, holding that the charges against petitioner were not "so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment", in the language of *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

(b) The Evidence Sustaining Petitioner's Convictions

Torrance became a member of the Turnpike Commission in June 1943 (R. 5108).[1] From sometime prior to 1948, he was Secretary-Treasurer, until May 1956 (R.

[1] Page references are to the original transcript of the trial.

5127). Manu-Mine, a company with little experience and a corporate existence of only two years, began to get substantial Turnpike contracts in 1953, the first big contract being for work on the tunnels. At that time Torrance knew that Stickler, the head of the company, was the nephew of Chairman Evans' wife (R. 5132, 5243). Torrance voted to award Manu-Mine the tunnel contracts, as he did every subsequent contract, without competitive bidding, and without even raising the question of competitive bidding (R. 5201). For the tunnel work, Manu-Mine was paid $1,665,339.30 (R. 2609) and has claimed an additional amount of $93,564.20.

In May 1954, just before Manu-Mine was to be awarded another substantial contract and while Manu-Mine was being allowed to patrol the northeast extension of the Turnpike without any contract at all (R. 5138-5139), Torrance permitted Stickler to have Manu-Mine construct a trench silo on Torrance's farm (R. 5143-5144, 5285-5287). Five Manu-Mine employees worked on the job (R. 4324). On July 7, 1954, Manu-Mine was awarded a three-month contract for exploratory drilling on a twelve mile section of the Northeast Extension, to determine whether or not a program of subsurface support was necessary (R. 5138). This contract was extended a number of times, and under it, Manu-Mine was paid $376,962.60 (R. 2609). It was not bid (R. 5201).

The consulting engineers to the Commission had not recommended the expenditure of any sum for subsurface support (R. 5346). However, because of competitive bidding on other construction contracts, it became clear by July 1954 that there would be a substantial "underrun", resulting in an unexpected surplus of some $20,000,000.00

(R. 4665, 4625). Torrance knew of the availability of this unexpected fund (R. 4626).

In December 1954, just before the awarding of the biggest Turnpike contract which Manu Mine was to get, viz., the contract of February 28, 1955, Torrance received a gift certificate from Stickler, evidencing a continuing personal association. He spent it (R. 5141 5142, 5252). Torrance already felt at that time that Manu Mine would be the contractor for the drilling to be done for subsurface support (R. 5296). He admitted that Manu Mine was selected because they were "the people we wanted to do it" (R. 5224). Torrance was present with Chairman Evans in Wilkes Barre in January 1955, when the leak to the newspapers that Manu Mine already had the Turnpike drilling job caused the Chairman so much consternation (R. 4207, 4211). At that time Manu Mine was still engaged in the engineering phase of its work, under the contract of July 7, 1954, which was supposed to determine whether or not any subsurface support was necessary (R. 5181). That exploratory contract was not finished until the fall of 1955.

Prior to the Commission meeting of February 28, 1955, at which the new contract was formally approved, Torrance personally explained it to the new Commissioners, McSorley and Lawler (R. 5296). The meeting itself was one of McSorley's and Lawler's very first (R. 5294 5295). Lawler testified that at the meeting, before the motion was made to approve the contract, Torrance, along with Evans, recommended Manu Mine for its international reputation and impressed upon him that *"it was the only firm in existence at this time that was qualified to do that type of work* (R. 5685-5686). *Torrance never denied that he made that*

representation, either in his account of the meeting (R. 5140-5141), or in fact at any time, throughout his long appearance on the witness stand.

Actually, Torrance, when he made that representation, did not know what Manu-Mine's drilling experience was (R. 5239-5240); nor had he made any personal investigation of its qualifications for drilling (R. 5224). He did know that Manu-Mine had *only one drill* (R. 5312), and that they were not expert (R. 5237). Yet, this was the *biggest* drilling job in the Commission's history (R. 5188).

Torrance knew that jobs which should be bid are easy to determine because they *stand out* (R. 5208, 5214). The Commission itself, and not its engineers, is the final arbiter of that and has the responsibility for deciding whether or not to invite bids (R. 5306). Torrance did not ask the engineers if this contract should be bid (R. 5200), even though other Turnpike drilling jobs had been bid (R. 5229, 5237). In fact, the general rule of the Commission was to invite bids for drilling (R. 5187, 5199).

Torrance never questioned any of the prices for Manu-Mine's work (R. 5249-5250). Under the contract of February 28, 1955, the price was $12.50 a foot for drilling. Torrance did not check its reasonableness, and had no information on it, nor did he question the price (R. 5201, 5250, 5300), though he knew it was not the result of competitive bidding; that no one knew how much drilling was to be done (R. 5297); and that it was the biggest drilling job in the Commission's history (R. 5188).[2] He knew it

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[2] Dr. Cleaves, an expert witness for the defense, testified as follows:

"Q. Do you realize, Doctor, that there were somewhere in the neighborhood of 600,000 feet drilled?"

A. I do now.

was going to be expensive (R. 5174). Manu Mine's initial estimate for drilling was $4,120,000,000 (R. 5297). After the award of the contract, the estimated cost for the project *swelled* to $13,533,008,000; at one point it was contemplated that the total expenditure for drilling and slushing would be $19,500,000,000 (R. 5473), and later it was cut back to $9,350,000,000 (Torrance's Brief in the Pa. Superior Court, pp. 15/16). By the time of its suspension, Manu-Mine had been paid by the Commission $6,724,719,000 for drilling alone under the contract and claimed an additional $833,000,000 (R. 2954, 2955). It was paid an additional $121,722,000 for supervision, showing that the physical job of drilling far exceeded all other work. The profit derived from these payments was at least one hundred percent (R. 2975; 2976).

Contrary to the practice of the Commission, the contract was awarded without requiring Manu Mine to post any bond (R. 5303). A bond was posted several months later, when Chairman Evans was about to leave the Commission (R. 992, 4384). Also the usual ten percent retention clause, which had been in an initial draft of the contract, was eliminated (R. 4032, 4925).

Torrance, as Secretary-Treasurer, approved all of the checks for payments to Manu-Mine under the contract (R. 950 et seq.). The following schedule of huge payments, which followed each other in such rapid succession, should clearly have warned him that something was amiss, con-

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Q. What have you to say about that?

A. I wouldn't have built the road, either wouldn't have built the road or would have taken a calculated risk. That number of holes the whole proposition became *absurd*, in my opinion." (R. 4202) (Emphasis added)

sidering the known relationship of the company to the Commission Chairman (R. 950 et seq.):

$ 84,904.16—Paid 5/19/55
189,995.83—Paid 6/2/55
293,432.29—Paid 6/29/55
321,457.29—Paid 7/19/55
244, 520.83—Paid 7/27/55
513,100.00—Paid 8/24/55
430,784.37—Paid 9/13/55
274,693.77—Paid 9/27/55
137,903.13—Paid 9/29/55
756,052.08—Paid 10/21/55
360,845.83—Paid 11/2/55
325,190.45—Paid 11/15/55
424,714.58—Paid 12/12/55
665,937.50—Paid 12/22/55
590,712.50—Paid 1/10/56
575,897.91—Paid 1/20/56

While this was originally classified as an engineering contract to avoid competitive bidding, once it was awarded, it was given a construction contract number, in June 1955 (R. 986), because classifying it as a construction contract *expedited payments* (R. 988). If Torrance honestly believed it was an engineering contract, this assignment of a construction number coupled with the rapid succession of huge payments, again should have acted as a warning, but he raised no question.

In early 1956, Torrance learned that Richard Evans, the son of Chairman Evans, had been a shareholder and officer in Manu-Mine (R. 5132, 5133). It was incredible that he did not already know. A simple call to the Depart-

ment of State would have revealed Richard Evans as an original shareholder. Thereafter, he received the report of the Department of Mines which exposed Manu-Mine's program as unnecessary (R. 5155). Torrance persisted in his view that the program was necessary, and sent a copy of the Department of Mines' report to Manu-Mine (R. 5155).

ARGUMENT

The evidence in the record sustaining petitioner's convictions is ample, quite apart from the criteria of *Garner v. Louisiana*, 368 U.S. 157 (1961); or *Thompson v. City of Louisville*, 362 U.S. 199 (1960). Under the standards of those decisions it is a fortiori sufficient, since they set aside state convictions as violative of due process, only where the record was devoid of evidentiary support to sustain the convictions. This Court certainly did not contemplate in deciding those cases that it would be called upon to weigh the sufficiency of the evidence in routine cases such as that presented by the petitioner here.

Moreover petitioner argues that "the holdings in *Thompson* and in *Garner* . . . were not startling innovations in the field of federal constitutional law, but rather the natural and logical application, in the field of criminal convictions, of well recognized traditional constitutional principles which compel the conclusion that it is a violation of due process for a state to uphold a conviction entered upon a record so devoid of evidentiary support that a jury could not, in reason, have entertained the belief that the defendant was guilty of the crime charged". (Pet. for Cert. p. 9.)

If that is so, there was no excuse for petitioner's withholding that constitutional issue in his direct appeals through the Pennsylvania courts and in his prior petition for certiorari to this Court. Petitioner had full opportunity to raise this "traditional constitutional" issue at every stage of his appeals, but chose to inject it as a sort

of afterthought, not even in his written petition for a writ of habeas corpus in the district court, but only at the oral argument. Such a holding back of constitutional issues should not be condoned, and petitioner could well be deemed to have waived the issue. Cf. *United States ex rel. Williams v. Lavallee*, 276 F. 2d 645 (2d Cir. 1960), appeal dismissed, 362 U.S. 637.

In any event, under no constitutional test was petitioner denied due process with respect to the evidence sustaining his convictions.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 855

COMMONWEALTH EX. REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, Respondent

PETITIONER'S REPLY BRIEF

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TABLE OF CASES

	PAGE
Cox v. United States, 332 U.S. 442; 68 S.C. 115; 92 L. Ed. 59 (1957)	1
Dickinson v. United States, 346 U.S. 389; 74 S.C. 152; 98 L. Ed. 132 (1953)	2
Gibson v. United States, 329 U.S. 338; 67 S.C. 301; 91 L. Ed. 331 (1946)	3
In Re Greenburg, 16 N.J. 132; 104 At. 2d 46 (1934)	4
New York Central v. Johnson, 279 U.S. 310; 49 S.C. 300; 73 L. Ed. 706 (1929)	5
Rochin v. California, 342 U.S. 165; 72 S.C. 205; 96 L. Ed. 183 (1952)	6

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PETITIONER'S REPLY BRIEF

I.

The reason given by petitioner for granting the writ is the need for this Court's choice between the dichotomy of "no evidence" and "no evidence sufficient in reason" to support a finding.[1] The existing ambiguity in this important developing area of law can be dispelled without this Court's being required to inquire closely into the sufficiency of the evidence to support petitioner's conviction. If the law were declared and clarified, its application could be left to the Court below, upon ap-

1. The ramifications of the distinction have concerned this Court in other applications. See *Dickinson v. United States*, 346 U.S. 389, 397, 398; 74 S. C. 152; 98 L. Ed. 132 (1953). See also the dissenting opinion of Mr. Justice Murphy in *Cox v. United States*, 332 U.S. 442, 457, 458; 68 S. C. 115; 92 L. Ed. 59 (1957).

propriate remand. See *Gibson v. United States*, 329 U.S. 338, 351; 67 S. C. 301; 91 L. Ed. 331 (1946).

On the other hand, if this Court should undertake to inquire into the sufficiency of the evidence to support petitioner's conviction, the inquiry would end as soon as it should find any evidence which would in reason sustain a finding of guilt. Only if petitioner's argument that there is no such evidence is well taken would such an inquiry require the examination of the entire record. If petitioner's position is well taken, (and petitioner is therefore an innocent man serving an unjust sentence imposed at the twilight of an honest life), it would be neither unprecedented nor inappropriate for this Court to make such examination.

II.

It did not seem appropriate to petitioner to draw this Court into a close scrutiny of the testimony at petitioner's trial in connection with the application for certiorari. Three of the seven Pennsylvania Superior Court judges who heard the appeal concluded that there was insufficient evidence to sustain a finding of petitioner's guilt; two of the six Pennsylvania Supreme Court justices reached the same conclusion. The Court of Appeals for the Third Circuit did not summarily dismiss petitioner's contention about the insufficiency of the evidence, but, rather, invited petitioner so submit the constitutional implications of the issue to the Pennsylvania courts, significantly reserving decision on the ultimate proper disposition of the case if it should be again presented to it.

The opinions of these jurists attest that there is more merit in petitioner's contention that his conviction is without evidentiary support in the record than appears from the respondent's statement of the evidence. (Brief in opposition, pp. 3-9) This is in part attributable to respondent's failure to state the facts with fairness and candor, in order that this Court might have before it a "balanced order of facts, exactly and fairly stated." Compare *Rochin v. California*, 342 U.S. 165, 172; 72 S. C. 205; 96 L. Ed. 183 (1952).

It is not possible, without a complete emendation of the Brief in Opposition, to point out all the respects in which respondent's statement of the facts departs from the standards to which parties should hold themselves in a case such as this. See, *In Re Greenburg*, 15 N. J. 132; 104 At. 2d. 46, 47 (1954); *New York Central v. Johnson*, 279 U.S. 310, 319; 49 S. C. 300; 73 L. Ed. 706 (1929). One or two illustrations will demonstrate the validity of this criticism.

On page 8 of respondent's Brief in Opposition, it is stated that the basic contract through which the alleged fraud was accomplished had been originally classified as an engineering contract to avoid competitive bidding, but that after it had been awarded, the contract was reclassified as a construction contract, in order to expedite payments thereunder. It is argued that if petitioner had honestly believed it was an engineering contract, the assignment of a construction number to it, coupled with the rapid succession of huge payments, should have acted as a warning to him.

The facts are that there was *no* testimony in the record which supports respondent's assertion that the contract was originally classified as an engineering con-

tract in order to avoid competitive bidding. On the contrary, even the evidence in the Commonwealth's case establishes that everyone concerned with the matter believed, at least at the outset, that the Manu-Mine contract involved engineering work, rather than construction work (69a*, 98a, 509r-516r**, 820r, 824r, 842a, 1221r).

Similarly, respondent's assertion that the contract was given a number "because" classifying it as a construction contract expedited payments is without support in the record. The facts are that this number was assigned to the contract by the Finance Director of the Turnpike Commission, entirely on his own initiative. The Pennsylvania Superior Court, held as a matter of law that nothing which had been done by this officer had "aided in the perpetration of the fraud." (See Opinions of Court below, page 76a).

The reference to the "rapid succession of huge payments" is likewise inexact and inaccurate. It disregards the fact that the total amount being spent by the Turnpike Commission for the Northeast Extension was in excess of $200,000,000, and the original estimates put the cost of the Manu-Mine work at four million so that the payment of even several million dollars to Manu-Mine would not, in this context, necessarily seem remarkable. It was originally estimated that the cost of the Manu-Mine work would be four million dollars and would take six months. The payments which were made to Manu-Mine did not exceed four million dollars until the middle of December. (Commonwealth's Exhibit 42, 619r) Thus, contrary to respondent's statement, the pay-

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* Reference is to the record in the Court of Appeals.

** Reference is to the trial transcript.

ments were consistent in amount and in time with the estimates known to petitioner.

It should also be kept in mind that petitioner's approval of the payments was preceded by the approval of a number of accountants, engineers and others, none of whom has been convicted of any wrong doing in connection with this matter. The payments were likewise approved unanimously by the other members of the Turnpike Commission including the Pennsylvania Secretary of Highways (619r, 625r-639r). Petitioner's role in making and approving the payments was in no way different from that of any other Commissioner. His signatures on the checks which were drawn were facsimile signatures put on as a matter of routine by employees of the Commission. (915r, 950r, 966r)

On pages 5 and 6 of the Brief in Opposition, respondent suggests that petitioner knowingly made false representations to other members of the Turnpike Commission concerning the qualifications of Manu-Mine to perform the work called for under the challenged contract.

This assertion is premised entirely upon an interpretation of two sentences in the testimony of one witness at petitioner's trial. (569r, 570r) The one sentence is to the effect that petitioner *or perhaps someone else* discussed the importance of the Manu-Mine contract and its relation to the overall construction job with the other members of the Commission before the contract was approved. (569r) The witness also stated that petitioner *or someone else* pointed out that Manu-Mine had an international reputation, was an outstanding firm and was the only one qualified to do the job at the time. (570r)

This testimony, insofar as it attributes these remarks to petitioner, is of no probative value, not only because of the ambiguous way in which it is stated, but because it conflicts with the minutes of the meeting which attribute the remarks to someone other than petitioner; it is in conflict with the testimony of the same witness at other parts of the record, and the witness confessed on cross-examination that he was unable to specify who had participated in the discussion or to remember any of its details. (680r, 802r)

Thus, the serious accusation in respondent's brief that petitioner had made these representations to the Commission rests upon discredited, equivocal testimony which, by its very wording, shows that it is nothing more than a guess of the witness. (569r, 570r)

In addition, the trial record is entirely devoid of evidence that the representations thus attributed to petitioner were untrue. There is nothing to show that Manu-Mine Company was not, in fact, a company of international reputation or that it was not, in fact, peculiarly fitted to do the work called for by the contract. Respondent points derisively to the fact that it commenced from humble beginnings with small capital, and at the time of the contract owned but a single drill. However, this company did a vast amount of drilling work pursuant to the contract, which work was approved after its inspection by numerous people, including engineers of the Pennsylvania Department of Highways.

Moreover, before the award of the disputed contract, this company had done quite satisfactory work of a unique kind for the Commission. One of the principal

witnesses for the Commonwealth, a representative of the Pennsylvania Department of Mines, conceded that the information collected by this company under its earlier contracts with the Commission was "excellent." (2061r)

The uniqueness of the service offered by Manu-Mine is demonstrated by the fact, established in the testimony of other Commonwealth witnesses, that efforts to get cost estimates for the work from other companies, including one of the largest drilling companies in Pennsylvania, were not successful because such companies did not engage in such work and were unable even to provide cost estimate data. (2372r-2377r, 2380r) Thus, there is nothing in the record to support respondent's insinuation that petitioner made representations to the other members of the Commission concerning the Manu-Mine Company, or that the representations attributed to him were known to be false.

There are many other unsupported and unwarranted statements in respondent's "summary of the evidence." Therefore, this Court should not conclude, without plenary hearing or full briefs on the matter, that the evidence in reason supports a finding of petitioner's guilt.

Respectfully submitted,

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